

10/17/07

## Senate Bill 138 Family Justice Bill

Good afternoon Ladies and Gentlemen: I am here today to speak in favor of Senate Bill 138. I believe every person who is in favor of this bill deserves the right to a courtroom trial when they have suffered the loss of a parent or adult child due to medical malpractice.

Let me begin by telling you a little about my family. My mom and dad lived in the same house in Wauwatosa since 1952. There were 4 children in a 3 bedroom home with one bathroom. My dad was a machinist for the Falk Corporation and retired after working there for 43 years. Mom died in 2001 after suffering a brain aneurysm. Since she had no written last wishes and after listening to the reports from the doctors, my dad, my siblings and I made the heart wrenching decision to take mom off of life support. After about a year, my dad moved up to Appleton so he could be closer to us. He and his dog Lizzie moved into a very nice apartment and for the most part enjoyed his new surrounding. In late 2004, Dad began having problems with balance/walking, memory loss and finally urinary incontinence. After much testing and doctor visits those three symptoms pointed to ~~low~~ <sup>Low</sup> or normal hydrocephalic pressure. Some of the ventricles in the brain were plugging up creating a backup of cerebral spinal fluid and this was putting pressure in the brain which caused the problems he was having. The solution was to surgically insert a shunt into the brain and have the excess cerebral spinal fluid empty into the abdominal cavity. After talking this over with Dad, he was willing to go thru with the surgery. He was very unhappy about his present health and was willing to do anything to improve his quality of life. *He trusted the doctors & the hospital to take care of him.*



The surgery was set up for Monday, July 11, 2005. He came thru the surgery fine. The doctor told my brother and I that Dad was talking in the recovery room, would be transferred to a surgical room and we could see him soon. Needless to say we were both very happy to see Dad awake and conversing. He had the alternate pressure stockings on and had an IV in his arm. He was shaking and said that he was so cold so nurses gave him warm blankets and said that as soon as his temperature rose he would feel much better. Dad continued to shiver to the point that the staff turned off the alarm on his bed because it was going off all the time at the nurses station. During the time we were with him, the nurses got him up to the bathroom a few times. I fed Dad some liquid supper, the rest of the family came in for a short visit; and about 7pm Dad said we should all go home; he was going to rest and so should we. So we all left and that was the last time we spoke with Dad. At about 10:30pm I received a call from the hospital saying that my dad had fallen out of bed, struck his head and was unconscious. I raced to the hospital and found dad in the x-ray department. I was told that the nurse had taken Dad to the bathroom, got him ready for bed, went outside the room to do her nursing notes and heard the crash. She had never set up another means of an alarm. The report was that dad had suffered a massive hemorrhage in the brain to the point that it had moved the brain stem 3-4cm off center. The doctor could do surgery to remove the blood clot but there was a definite chance he may not walk, wouldn't be able to communicate and would possibly have an change of personality. So for the second time in four years we siblings had to make the heart wrenching decision to take our Dad off life support. We are a family of 4 children, 7 grandchildren and 4 great grandchildren. Our time to be together, taking walks, playing



with the great grandchildren was taken away from us. And I am sure his dog, Lizzie misses him greatly. The surgery was a success; his hospital safety was a failure.

Mercy Medical Center, Oshkosh did not voluntarily report this "sentinel event" to the Joint Commission on Accreditation of Healthcare Organizations. So after the required 45 days, I put in a request for an investigation. One was done but we were never given the results; just the opposite of what their web site states. Next we had the Wisconsin Department of Health & <sup>Family</sup> ~~Human~~ Services do an investigation. They found several failures of the hospital staff and procedures to keep our dad safe. One of his doctors said to us in the ICU room, "this should not have happened!!!"

We have had contact with legal counsel and the bottom line is we would only be able to sue for the 15 minutes or so my dad was responsive after the fall according to current law.

Our comments to the committee are:

1. Any surviving relative should be entitled to compensation from loss of companionship of a relative who dies from negligence; being economically dependent should have no part in the criteria.
  2. Why are Wisconsin Hospitals not required to report in patient deaths? This keeps the consumer unaware of situations that may affect the consumers choice of health care facilities.
  3. Being in the healthcare field for more than 30 years my sister was appalled at the findings of the investigation with regard to patient care that this hospital failed at.
- Putting legislative restrictions on our ability to receive compensation doubles the agony we have felt with regard to our father's death.



4. Are Wisconsin hospitals no longer responsible to and for their patients. 2

When we send our loved ones to the hospital because of a illness or disease why should they die from an error or accident in the hospital??

Thank you for your time and consideration

Susan Ernst, daughter of Lyle May





TARA ANN PIECHOCKI  
PULASKI, WI  
1981-2003

We are asking for your support in the Family Justice Bill. Involving the death of our 21 year old daughter Tara. Our Daughter suffered from seizures and was being treated for them. Unfortunately, her health care was mis-managed at Froedtert Hospital, stated by a Neurologist that reviewed Tara's medical records after her death.

At the age of 3 Tara was diagnose with a seizure disorder, Tuberous Sclerosis. Tara was on seizure medication to control her seizures. When Tara was 20 years old she was referred to an adult Neurologist, who discussed with her, there is a brain surgery that would stop the seizures. Tara had to go through numerous test to see if she qualified for the surgery. When the test results were done, they found 2 brain tumors and the Doctors agreed the tumors could be removed safely and she would live a seizure free life.

December 18, 2002, we met with the Brain Surgeon at the hospital. Our main concern was "what were the chances of something going wrong", and he chuckled and stated, "I do hundreds of brain surgeries in a year and never lost a patient. The main concern they had was the patient getting an infection.

Monday January 06, 2003, 7:30 am Tara had her brain surgery at Froedtert Hospital. The hospital just opened their New Neurology & Epilepsy wing.

Tara would have to undergo two surgeries. First surgery was to put grids on her brain. To monitor seizures and brain activity.

# THE HISTORY OF THE

REIGN OF

CHARLES I.

THE first year of the reign of Charles I. was a year of great calamity to the kingdom. The king was forced to flee from London, and the country was in a state of confusion. The king's health was also very poor, and he died in the year 1649.

The second year of the reign of Charles I. was a year of great calamity to the kingdom. The king was forced to flee from London, and the country was in a state of confusion. The king's health was also very poor, and he died in the year 1649.

The third year of the reign of Charles I. was a year of great calamity to the kingdom. The king was forced to flee from London, and the country was in a state of confusion. The king's health was also very poor, and he died in the year 1649.

The fourth year of the reign of Charles I. was a year of great calamity to the kingdom. The king was forced to flee from London, and the country was in a state of confusion. The king's health was also very poor, and he died in the year 1649.

The fifth year of the reign of Charles I. was a year of great calamity to the kingdom. The king was forced to flee from London, and the country was in a state of confusion. The king's health was also very poor, and he died in the year 1649.

Wednesday, January 08, 2003, morning Tara was taken out of ICU and put in a regular room. Tara was doing well. Headache from surgery was mild and pain medication was being decreased.

Wednesday night Tara started to have some discomfort. Before we left the hospital that evening we brought this to the Nursing staff attention.

We returned to the hospital early Thursday morning, January 09, 2003. Tara stated, she felt worse then the night before and her pain level had increased. As, we checked with the Nurse, Tara was taking all medication on schedule. As the morning progress, Tara's condition worsen. Pain level was higher then the pain after brain surgery.

We brought this to the Nurses attention. At, this time Tara no longer could sit upright. The pain was so severe that she kept falling to her left side. The Nurse came into the room and helped us sit Tara upright in bed. At sometime the Nurse should have taken a pin light to check her pupil for dilation. Which was never done. These were the signs the Nurse should have caught and called for a Doctor.

When Tara's Neurologist was out in the hallway, we asked him to check on Tara and he said, "he was making his rounds and he will be back to see Tara and we shouldn't worry". He refused to hear our cry for help, as he continue to make his rounds.

The fluid from the swelling of the brain has no place to go and causes the brain to be pushed down to the base of your neck, that causes paralyzation first, loss of eye sight and eventually a very painful death.

We continued having the Nurses come into the room and help us

1891. The first of these was the "The Great  
The Great The Great The Great The Great  
The Great The Great The Great The Great The Great

The Great The Great The Great The Great The Great  
The Great The Great The Great The Great The Great

The Great The Great The Great The Great The Great  
The Great The Great The Great The Great The Great  
The Great The Great The Great The Great The Great  
The Great The Great The Great The Great The Great

The Great The Great The Great The Great The Great  
The Great The Great The Great The Great The Great  
The Great The Great The Great The Great The Great  
The Great The Great The Great The Great The Great  
The Great The Great The Great The Great The Great

The Great The Great The Great The Great The Great  
The Great The Great The Great The Great The Great  
The Great The Great The Great The Great The Great  
The Great The Great The Great The Great The Great

The Great The Great The Great The Great The Great  
The Great The Great The Great The Great The Great  
The Great The Great The Great The Great The Great  
The Great The Great The Great The Great The Great

The Great The Great The Great The Great The Great

sit Tara upright. Kept asking, why was this happening? The Neurologist that reviewed Tara's medical records after her death, stated, "the above signs were all the signs a first year Medical student should have caught".

By the time Tara's Neurologist and Medical students stopped in her room for routine examination Tara went into a coma during examination.

Tara's final words to the Doctor were, "I can't see, I can't see".

Tara past away from swelling on the brain.

As you can imagine, her loss has been emotionally shattering for her family. But we felt that we could not rightly retreat from the situation and instead seek Justice for Tara and to prevent other families from suffering the same trauma at hands of negligent hospital staff.

We were stunned to discover under the current Wisconsin Law, we essentially have no legal remedies to pursue. The current Law on Wrongful Death has a double standard that we find hard to believe exists in this day and age. If the victim of Wrongful Death is over age 18 or is a Widowed or Divorced Parent the family has no legal right to seek compensation. But, if the child victim is under age 18, or is a Married Parent, then the family has full legal rights to pursue justice.

For us, this a matter of justice, not money. No amount of money will bring our daughter Tara back. But having the right to our day in court will give us a chance to seek justice in her name, and also hopefully mean that no other family is forced to endure the loss like we have.



## **Testimony of**

**Dr. Eric E. Rice  
President and CEO, ORBITEC  
Madison, WI**

### **In Support of the WISCONSIN FAMILY JUSTICE BILL October 17, 2007**

Mr. Chairman and Committee Members, it is a pleasure for me to speak to you today regarding this most important bill. We have been trying to get this bill passed for many years -- it is time we finally do it!!

On April 19, 1999, The Linda and I lost our youngest daughter, Erin Elisabeth Rice, a 20-year old graduate of Middleton High School, of medical malpractice by GHC and UW Hospital. Because of Wisconsin's law we could not bring a loss of society claim against the people that literally killed our daughter. She would have been 29 yesterday. It has been a difficult time in our lives. The reason why I'm here to talk to you and fight for law repair today is that only you, the victims, their families and close personal friends know about the problem of the flawed Wisconsin Law; the general public in this state does not have a clue. I slipped; the Medical Society, doctors and the insurance lobbies know about the flawed law and continue to fight the repair.

Currently, if you're single son or daughter is 18 or older and experiences medical malpractice and dies in Wisconsin that you, as a parent or sibling, will not be able to bring a claim for wrongful death against the wrong doers. Also, if your single parent experiences medical malpractice and dies as a result in Wisconsin, that you as an adult child of that parent will not be able to bring a claim for wrongful death against the wrong doers. You will never find out what really happened, you will never get accountability, and you and your family will never see justice or accountability. Currently the law discriminates against two classes of people, single young and single elderly.

What is wrong? It seems that the health care and insurance company lobbyists and contributors worked their magic in the Wisconsin State Legislature in 1995 by sneaking in some language that was made into law, without the any public understanding or awareness. In this time of "family values", it is totally unbelievable that Wisconsin law does not recognize the life-long bond between parent and child, regardless of the child's or parent's age and regardless of whether the parent is widowed or divorced. Up till now, the state law has been based on the bottom-line values of the health care providers,

insurance companies, and manufacturers and other big campaign contributors, not the family values held by the majority of Wisconsin citizens.

Wisconsin, of all states, you would think would be supportive of its citizen's rights. Not so. Six other states/districts in the US also have discriminating laws like this one, namely, Indiana, Florida, Maine, New Jersey, Maryland, and DC. Victims in these states are also fighting to change the law there to allow equality under the law. Forty-four do not discriminate!

Wisconsin families who have suffered the loss of a family member due to apparent medical negligence have found the courthouse door slammed shut in their faces. In response, they have formed the Wisconsin Family Justice Network (WFJN). We continue to fight on for repair of the law.

A group of Wisconsin families who suffered the loss of a family member due to apparent medical negligence have been fighting to change the Wisconsin law back to what it was prior to 1995. We are a small group of families who now understand what the law means. The rest of the public still doesn't understand. We have few resources, but we must get the message out to the unsuspecting public, voters, media, and work with the legislators to get the law changed! The current WFJN members, their home towns, and their victimized family member are:

Jeanine & Lauren Knox Milwaukee (mother)	Lonny & Rhonda Brown Chippewa Falls (son)	Patty Schey Wauwatosa (father)
Stephanie O'Connell Green Bay (father)	Willie Davis Milwaukee (mother)	Steve Janasik Park Falls (mother)
Roger Fransway Chippewa Falls (sister)	John Zachar Greendale (mother)	Harriet Yancey Milwaukee (father)
Jim & Donna Harvey Waterford (mother)	Judy Demeuse Colgate (father)	Sheryl Holdmann Muskego (mother)
Sherry Ellis Oak Creek (mother)	Carolyn Walasek Park Falls (mother)	Jake Budrick Saukville (mother)
Bernice Watts Brown Deer (daughter)	Helen Szurovecz Milwaukee (mother)	Lee Davis Menomonee Falls (brother)
Sandy Gunwaldt New Berlin (mother)	Pam Vertanen Manitowoc (mother)	Ray & Betty Lange Beaver Dam (son)
Dan & Kim Leister Mukwonago (daughter)	Susan Czapinski Madison (mother)	Rosemary Halvorson Readstown (mother)



<b>Peter Torgerson Colfax (mother)</b>	<b>Michelle Martin Green Bay (mother)</b>	<b>Mary &amp; Richard Piechocki Pulaski (daughter)</b>
<b>Anita Harris Milwaukee (son)</b>	<b>Phil Tipke Cottage Grove (son)</b>	<b>Loretta Nakielski Iron Ridge (father)</b>
<b>James &amp; Dottie Webb Whitewater (daughter)</b>	<b>Jeanne Hanson Neenah (son)</b>	<b>Rick Rodriguez Milwaukee (brother)</b>
<b>Eric &amp; Linda Rice Middleton (daughter)</b>	<b>Sister of Jackie Hemenway Twin Lakes (father)</b>	<b>Kristine Henricksen Milwaukee (mother)</b>
<b>Dimitri Jordan Milwaukee (mother)</b>	<b>Mark Lavalle Twin Lakes (mother)</b>	<b>Robert Hughes Sparta (self)</b>
<b>James Bollig Cottage Grove (father)</b>	<b>Lisa Jacobsen Darlington</b>	<b>Debbie Scheider DePere (son)</b>
<b>Sharon Kind West Bend (mother)</b>	<b>Bernice Fieber West Bend (daughter)</b>	<b>Theresa Dawson Milwaukee (mother)</b>
<b>Jonna Fedie Hammond (mother)</b>	<b>Christine &amp; Doug Spindler MN River Falls (son)</b>	<b>Jamie Martin Kansasville (father)</b>
<b>Mary McBride Madison (father)</b>	<b>Elfie Schneider Grafton (mother)</b>	<b>Larry Rasmussen WI (son)</b>
<b>Mack Kirksey Brown Deer (mother)</b>	<b>Myron &amp; Barbara Daczyk Menasha (daughter)</b>	<b>Lynn Mallak West Allis (ex-husband)</b>
<b>Mary Siedschlag Argyle (mother)</b>	<b>Nancy Hoffman Green Bay (father)</b>	<b>Linda Steinke Oak Creek (son)</b>
<b>Kathleen Sese Kewaskum (son)</b>	<b>Rosita Dorsey Milwaukee (mother)</b>	<b>Maureen Flieter Hilbert (father)</b>
<b>Lee Brown Milwaukee (mother)</b>	<b>Barbara Hawley Oshkosh (mother)</b>	<b>Tom May Hustisford (father)</b>
<b>Taron Monroe Milwaukee</b>	<b>Ed Kelley Racine (brother)</b>	<b>Tom Gauthier Oshkosh (mother)</b>
	<b>Linda Heinrich Greendale (mother)</b>	

The focus of the Wisconsin Family Justice Network (WFJN)—growing since being formed to about ~67 families across the state—is now turning to the State Legislature, where Network members are working to build bi-partisan support for the passage of the

Wisconsin Family Justice Bill and other legislation. This is not a political issue! Republicans and Democrats together should recognize that this problem needs fixing as soon as possible. We will not stop our efforts until we get the Wisconsin Family Justice Bill passed by the legislature and signed by the Governor. The bill is aimed at repairing the loopholes in current state malpractice law.

A barrage of "miss-information" by opponents of the Wisconsin Family Justice Bill may again be upon us. Those trying to protect the unfair status quo will claim that Wisconsin's insurance rates will go up and that we will see doctors leaving the state or refusing to practice in nursing homes. But, malpractice costs are about one-half of one percent of all medical costs, so the claims of skyrocketing medical costs were plain ridiculous. 44 other states allow all families to have legal rights in malpractice cases, and they have not suffered any loss of doctors willing to practice.

Private malpractice insurance carriers are very healthy. The loss ratios for malpractice insurers from 1995 to 2000 are very low. During this period, the average loss ratio is 18. That is only 18¢ of every dollar the insurance company estimates it will pay on all malpractice claims. In addition, private physicians are compelled by state law to pay into the patient's medical compensation fund every year (roughly \$30 to 55M per year). The fund now has grown to a value approaching \$1B. Because it is so big, the Governor and others still want to take some of this surplus to help the state's budget problems. These insurance rates should be going down! But they are not – why??

The Wisconsin Family Justice Network suggests that once you, as a representative of the people of this great State of Wisconsin, honestly consider the thoughts below that you will be compelled to support and sign on as a co-sponsor of the Wisconsin Family Justice Bill.

- ❑ Do you believe that the bond between you and your parent and you and your child is life-long, and not eroded by age or marital status? Ponder that thought for a minute.
- ❑ How would you deal with the awful prospect of the loss of your own 18-year old son or daughter due to gross medical errors? How would you react with the fact that you can't go to court or get any legal representation because you are not allowed a loss of society claim and don't have an economic loss with a young adult/child or elderly parent under the current flawed Wisconsin law?
- ❑ Consider the prospect of the loss of your mother or father due to medical errors in a simple medical procedure and you can't get answers, accountability or justice.
- ❑ How would you deal with the fact that you can't get any attorney to take your case because of the current law limits what can be done?
- ❑ Do you feel comfortable with Wisconsin being one of *just 6 states of 50* that make arbitrary distinctions in legal rights, based on the age and marital status of the victim?

- ❑ Think about this, do you have less love? Less compassion? Less affection? Or less connection to your family members when they become 18 or even when they become 60 years old?
- ❑ And finally, was it really the intent of the Wisconsin State Legislature to implement a biased and discriminating law that denies equal protection that says your loving son or daughter, over 17 years old and your single mother or father has **ABSOLUTELY NO VALUE.**

The Wisconsin Family Justice Network and the rest of the citizens of this state simply want a single standard of access to the courts and accountability for all citizens. It is a fundamental matter of equity and equality; the current law is biased, discriminating and totally unfair and must be changed.



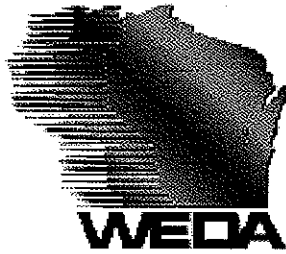
October 17, 2007

Testimony of Dr. Eric E. Rice for Approval and Eventual Passage of WFJB:

On April 19, 1999 our family was devastated, when our youngest child (then 20) passed away from a battle with viral cardiomyopathy. On April 5<sup>th</sup> my wife Linda took our Daughter Erin to our HMO health care provider, after Erin showed symptoms of cough, SOB and stomach upset. The doctor there sent Erin to the Emergency Room of UW Hospital, voicing concern that Erin had a potentially serious condition involving the heart or lungs, as he measured a very low blood pressure. The Emergency Room doctor, after many long hours of testing, including EKG and X-rays, diagnosed our Daughter with bacterial pneumonia and put her on antibiotics. Erin continued to have stomach problems, some swelling in the groin area and cough. We returned to the HMO several times and the last time the doctor prescribed Compazine, a nausea medication (not to be used by someone in heart failure). Her condition worsened and Erin went back to the Emergency Room early on the morning of April 17<sup>th</sup> and she immediately was given more Compazine for her stomach nausea. However, this time they performed an echocardiogram and declared that she was in critical condition and in heart failure with vital cardiomyopathy. They now told us that she had an enlarged heart and that her heart was only pumping with less than a 10% heart ejection fraction (~60% is normal). She went into multiple organ failure and died on April 19<sup>th</sup>. The doctors said there was nothing they could do to save her.

Well the grieving began that day and continues -- it has been absolutely devastating for my wife Linda. It took me quite some time to gain a copy of her medical records, seems the records went back to the ER for extended review. After I got them, I noted that an enlarged heart was noted on the record April 5<sup>th</sup>. The x-rays showed a significant heart enlargement (65% of chest cavity -- normal is 25%) on April 5<sup>th</sup> -- we nor Erin were ever told this until April 17<sup>th</sup>.

I began seeking legal and professional medical expert opinions regarding Erin's death and medical record. That review showed, through three independent expert reviews, that the medical diagnosis on April 5<sup>th</sup> was grossly in error and not normal expected practice. The EKG record showed heart muscle failure [no R-wave] – the EKG was grossly abnormal. Her x-rays showed heart failure, a very enlarged heart, lung compression due to the large heart, and no evidence of bacterial pneumonia. An echo cardiogram needed to be taken. Other findings have indicated that Erin would have had at least an 80 % chance of survival on April 5<sup>th</sup> had the correct diagnosis and proper treatment been made. I could speak for hours on what medical errors and omissions occurred, but I do not have the time today.



**Wisconsin Economic Development Association Inc.**

TO: Members, Senate Committee on Judiciary

FROM: Jim Hough, on behalf of  
Wisconsin Economic Development Association

DATE: October 17, 2007

RE: **OPPOSITION TO SENATE BILL 138**

A rational, fair and equitable civil justice system has been and continues to be a priority for Wisconsin's economic development community. For many years, WEDA has supported legislation which has sought to achieve these goals.

Unfortunately, Senate Bill 138 represents a change in direction that would promote litigation in an area where there is no objective way to measure damages. The legislative determination of limiting recovery for loss of society and companionship to spouses and parents and minor children is appropriate and should not be expanded.

We respectfully urge your opposition to SB 138.

[WEDA is a statewide association of approximately 450 members involved in the promotion of economic development in Wisconsin.]







## CITIZEN ACTION OF WISCONSIN

Organizing people to make Wisconsin  
a better place to live and work

Testimony on SB 138: "Family Justice Bill."

Robert Kraig

Communications and Program Director

Citizen Action of Wisconsin

Senate Committee on Health and Human Services

October 17, 2007

Thank you Chairman Erpenbach, and the members of the committee, for the opportunity to share my organization's position on this critical issue of fundamental justice.

The current state of Wisconsin law closes the courtroom doors to families who have suffered the loss of a family member due to apparent medical negligence if the family member was an unmarried childless adult child or a parent who was widowed, divorced or unmarried. Under current law, Wisconsin is one of just seven states that prohibits wrongful death claims from being filed by the parents of children over 18 years of age who die due to medical negligence. It also blocks wrongful death claims by the adult children of widowed, divorced or single parents who die as a result of medical malpractice.

These loopholes so defy logic and the reality of human relationships that many people have trouble believing that a progressive state like Wisconsin allows such rules to remain standing. These arbitrary and artificial distinctions based on age and marital classifications bear no relationship to the actual suffering created by medical negligence.

The victim's family is victimized twice. They find themselves unable to get answers, unable to achieve a sense that justice has prevailed, and unable to feel that they have done right by the loved one they have lost. Having heard the painful stories these families have shared, I can assure that their motives are neither venal nor vengeful. These families simply want justice and accountability.

We are not here to demonize doctors, the overwhelming majority of whom are careful and conscientious. In fact, we share the same philosophy outlined by Dr. Bruce Kraus, representing the Medical Society in testimony before a legislative committee on Jan. 19, 1995:

**"Claims against physicians should not be treated any differently than claims resulting from automobile accidents or against any individual."**

However, the current law creates a double standard: if a doctor were negligent on the highway, he or she would be held accountable for any needless loss of life. But when a doctor is negligent on the operating table, many Wisconsin families have no means of seeking justice and accountability.

Passage of the Family Justice Bill would put an end to the double standard and reopen the doorway to justice. That is all we seek: fairness, accountability, and justice.

# JUSTICE FOR ALL WISCONSIN FAMILIES

*Ending the double standard in current law*

	<u>Fact Situation</u>	<u>Current Law</u>
<b>Loss of Child in Medical Malpractice Case</b>	If child is under age 18 . . .	Parents may bring a claim for loss of society and companionship
	If child is age 18 or over . . .	Parents may not bring a claim for loss of society and companionship
<b>Loss of Parent in Medical Malpractice Case</b>	If parent is married with no minor children . . .	Surviving spouse may bring a claim for loss of society and companionship
	If parent is unmarried, widowed, divorced with no minor children . . .	No family member may bring a claim for loss of society and companionship
<b>Negligence by Doctor</b>	If behind the wheel of a car . . .	Subject to same accountability as other members of society
	In operating room . . .	Exempt from accountability in cases of adult children and parents without spouses or minor children

October 17, 2007

Reference: Jason C. Weinhold

My son Jason was, "1<sup>st</sup> Team All State" in Football. He planned to go to college and play football. One month after my son's 1999 graduation, he was shot in the leg by a drive by shooting. Knowing that he wouldn't be able to play football that year, put him into a state of depression and also pain pills. All his friends went into college, so he felt alone. He started using street drugs, which took me down a road I thought I would never be!

He was on the Methadone program, which helped him to get off Heroin. Using street drugs also lead to the court system. I remember Jason calling me from the House of Correction, asking me, "Mom, why is it when I do drugs I steal"? I replied, "Why does an alcoholic beat his wife when he's been drinking"? It's a disease, and it affects everybody differently.

Jason told me that he really needed treatment and he found an in house facility located in Oklahoma. I really didn't have that kind of money, but I felt if my son was ready for treatment, how could I say No! He arrived at Narconon on April 21, 2004 and completed the program on June 11, 2004.

Jason was doing very well when he arrived back home. He seemed positive again and was talking about being a counselor. Jason also apologized to me for what he has done, and also shared that if he ever



started to take drugs again, he would kill himself. He said he put the family through to much already.

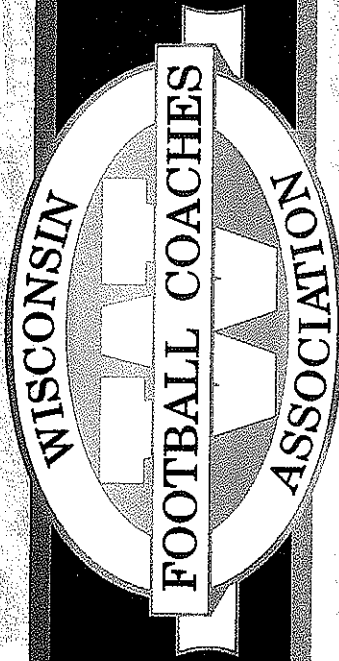
My sister and I were planning on going into a business together.

Jason also shared about moving out of Oak Creek. He felt embarrassed with his past and wanted to begin some place new. We ended up moving to Cedarburg, and started our business. Jason was a big help for us. He told me he was going to see a Doctor for his anxiety, due to an upcoming court date. I felt good about his decision to see a Doctor. I did notice Jason's behavior started to change. He wasn't as helpful anymore and just hung out in his room. When I questioned him, he told me he is seeing a Doctor and I'm not to worry. He also found out that he had Chronic Hepatitis C. Jason did end up going back to jail, but did get out on electronic surveillance and stayed by his brother. He had to stay in Milwaukee County. I could tell Jason was getting depressed again. Even his brother John, was sharing that it seemed like Jason was on drugs our something. Jason committed suicide on February 5, 2005.

Something didn't seem right to me, so on June 28, 2005 I went to Aurora Pharmacy in South Milwaukee, and asked for a print out of my son's medications from 8/04 to 1/05. I tried to get one from Walgreens, but they wouldn't release any information to me. When I noticed the large quantities of pills that were prescribed to my son, I was Shocked!! I did fill with Wisconsin Department of Regulation & Licensing and they felt the "Respondent's (Dr. Kurt) conduct in the care and treatment of this patient fell below the minimum standard of conduct for the profession". I feel when you read what has been found negligent with this Doctor, you will understand my being here today.

Linda Steinke





# 1998 WISCONSIN ALL STATE FOOTBALL TEAM

## AWARD OF EXCELLENCE

**JASON WEINHOLD**

DEFENSIVE BACK

**OAK CREEK HIGH SCHOOL**

COACH - JOE KOCH

**Bill Collar**

W.H.S.F.C.A., President

**Dick Rundle**

W.H.S.F.C.A., Executive Director



**Presented January 17, 1999**







June 11, 2004

Bridget Boyle  
2051 W. Wisconsin Ave  
Milwaukee WI 53233

Re: JASON WEINHOLD

Dear Ms. Boyle:

This is to inform you of Mr. Weinhold's successful completion of the *Narconon Arrowhead* drug and alcohol rehabilitation program. We are located in Canadian, Oklahoma in rural Pittsburg County. Narconon Arrowhead is an intensive residential treatment program which is fully accredited by CARF, the Commission on Accreditation of Rehabilitation Facilities, with in-depth treatment length varying depending upon the individual. Our goal is to restore the individual's former abilities so that he or she can leave our program with a commitment to sobriety, restored goals, and a higher level of ethical behavior. Narconon Arrowhead is a tax-exempt, not-for-profit Oklahoma corporation and has met all requirements under Section 501(c)(3) of the Internal Revenue Code.

Mr. Weinhold arrived at our facility on April 21, 2004. While in attendance on our program he satisfactorily complied with the client rules and showed positive forward progress on his case. He completed our full rehabilitation program on June 11, 2004.

During Mr. Weinhold's Phase One program he completed the *Therapeutic Training Routines* which are designed to enhance communication skills and control.

Mr. Weinhold also successfully completed the following Narconon required program steps: the *Narconon New Life Detoxification Program*, a sauna and vitamin regimen with a goal of helping eliminate drug residuals and metabolites stored primarily in the individual's fatty tissue.

The *Learning Improvement Course*, beginning Phase Two, enables the individual to enhance reading and comprehension skills. It enhances the ability to acquire and retain knowledge and overcome the barriers to study and learning. This course is a prerequisite for extensive life skills training courses.

HC 67 Box 5 • Canadian, OK 74425 • Phone: (800) 468-6933 / (918) 339-5800  
Fax: (918) 339-5801 • E-mail: [info@stopaddiction.com](mailto:info@stopaddiction.com) • Web: [www.stopaddiction.com](http://www.stopaddiction.com)

Copyright © 2001 Narconon of Oklahoma, Inc. All rights reserved.

Narconon of Oklahoma, Inc. is a 501(c)(3) non-profit public benefit corporation and is licensed by Narconon International.



Mr. Weinhold  
June 11, 2004

The *Communication and Perception Course*, with extensive cognitive counseling one-on-one, also is part of Phase Two. This course aids in breaking past impulsive behaviors and helps separate the individual from "living in the past."

In Mr. Weinhold's Phase Three program, he successfully completed the *Personal Values and Integrity Course*, an ethics-based study program, the goal being improving choices in life by applying basic concepts of ethics and moral. Mr. Weinhold demonstrated extensive personal growth during this phase of his program.

Also completed during Phase Three was the *Ups and Downs in Life Course*, which is designed to help clients identify and disconnect from anti-social associations or relationships that may have adversely influenced them in the past, and gives them fresh guidelines for the future.

Phase Three also included the *Changing Conditions in Life Course*, in which the individual divides their life into separate categories (self, family, group, spiritual, etc.) and allows inspection and repair of damaged areas utilizing practical formulas.

*The Way to Happiness Course* has 21 precepts that cover a moral and ethical code and way of living that results in a happier, more productive person.

#### Testing:

Oxford Capacity Analysis and standard I.Q. tests were applied at specific intervals, to a desired result.

While in attendance on our drug and alcohol rehabilitation program, Mr. Weinhold was actively and enthusiastically involved in his treatment program. Here is a partial listing of his achievements while in attendance at our facility:

1. He has achieved physical detoxification from chemicals, toxins, and toxic residuals during Phase One on the Narconon New Life Detoxification portion of his program.
2. He developed a commitment to abstinence.
3. He developed an understanding and acceptance of the process of addiction.
4. He identified issues (psychological, emotional, familial, social, etc.) that could interfere with his recovery, and has made a firm commitment to dealing with these issues effectively, recognizing this process did begin here but must continue.
5. He made a commitment to a peer support system.
6. He has recognized that his treatment at Narconon Arrowhead was the beginning of a process of recovery that must be carried on into continuing care, and has committed himself to a continuing care plan.
7. He became aware of his over-utilization of psychological defenses that prevent the development of insight about his addiction.
8. He demonstrated competence in communication skills training.



Mr. Weinhold  
June 11, 2004

9. He demonstrated an understanding of and ability to apply basic principles of ethics and morals. Mr. Weinhold has shown much growth in these areas since beginning his treatment program.
10. He has addressed anti-social behavior patterns and has come to a realization that this type of behavior is contra-survival for him, and society.

While participating in this program Mr. Weinhold was an exemplary member of our clientele, setting a fine example to others on the program. I must also point out that before an individual advances to the next step or Phase of their program they are tested on their knowledge of and ability to apply what they have learned to their life. They then attest to this understanding in our Qualifications Division.

Prognosis:

Mr. Weinhold showed an understanding of and ability to apply the life skills, ethics, morals, and communication skills to his daily life as well as a willingness to do so. With the successful completion of the program steps, a demonstrated understanding of the concepts and proven ability to use the learned life skills in daily life, the overall prognosis for Mr. Weinhold to sustain his commitment to a substance-free lifestyle is very positive.

Upon discharge from the Narconon Arrowhead drug rehabilitation program the client will be required to call in once a week for the first three months, then once a month thereafter. During this phone call, several things will be addressed:

- We will go over the client's Final Discharge Plan to ensure that they are accomplishing, or at least making an attempt to accomplish, the goals and targets they have laid out for themselves in their Final Discharge Plan.
- The client will be asked with whom they have been spending most of their time during that week and if they are working or attending school.
- The client will be asked if they are working the condition steps regarding their relationships with their family, groups, etc. At this point, the client can ask for any help necessary to apply the condition formulas.
- If the client feels he or she needs help applying the technology, or if they are reaching to get further help, one of our staff will work directly with the client by providing the appropriate ethics counseling or to help the client return to Narconon Arrowhead to do a review program.

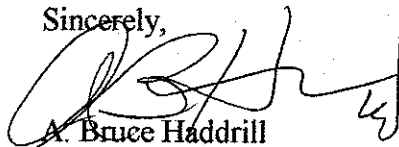
I have enjoyed watching the positive changes in Mr. Weinhold since his arrival at our facility, and it is my sincere belief that he has become a law-abiding, contributing member of society.



*Mr. Weinhold*  
*June 11, 2004*

If you have any questions regarding Mr. Weinhold's progress on our program, please feel free to contact me at (918) 339-5800, ext. 600.

Sincerely,

A handwritten signature in black ink, appearing to be 'A. Bruce Haddrill', with a stylized flourish at the end.

A. Bruce Haddrill  
Legal Liaison

ABH/vw





M E D I C A L   E X P E N S E S

WEINJA1  
 Patient: WEINHOLD, JASON C  
 RespPty: 8320 S CHICAGO ROAD  
 OAK CREEK WI 53154-  
 Birth: 09/13/1980

Pharmacy: AURORA PHARMACY #014  
 2414 10TH AVENUE  
 S. MILWAUKEE WI 53172-  
 RPh: HEIN, GREG  
 NCPDP#: 5123788

Prescriptions:

Date: 08/01/2004 TO 01/31/2005

LastFill	Rx #	Drug Name	Qty	Physician Name	T/P	Price	RPh
08/16/04	6905729	PENICILLN VK 500MG	40	Dr.CURRAN-MAERCKLE	GAMP	1.00	DAA
08/16/04	4900895	HYDROCO/APAP 5-500M	20	Dr.CURRAN-MAERCKLE	GAMP	1.00	DAA
08/22/04	4900973	HYDROCO/APAP 5-500M	20	Dr.HARMELINK	GAMP	1.00	DAA
09/02/04	6906967	TIZANIDINE 2MG	90	Dr.KURT	GAMP	1.00	DAA
09/02/04	2900465	OXYCOD/APAP 5-325MG	100	Dr.KURT	GAMP	1.00	DAA
09/07/04	2900487	AVINZA 60MG CR	10	Dr.KURT	MCK	2.00	KP
09/07/04	4901130	HYDROCO/APAP 10-325	100	Dr.KURT	GAMP	1.00	KP
09/08/04	2900494	MORPHINE SUL 30MG E	60	Dr.KURT	GAMP	1.00	KP
09/21/04	2900552	METHADONE 10MG	100	Dr.KURT	GAMP	1.00	DAA
09/21/04	4901286	DIAZEPAM 5MG	50	Dr.KURT	GAMP	1.00	DAA
09/21/04	2900553	OXYCODONE 5MG	200	Dr.KURT	GAMP	1.00	DAA
10/18/04	2900693	OXYCODONE 5MG	200	Dr.KURT	GAMP	1.00	DAA
10/18/04	2900694	METHADONE 10MG	60	Dr.KURT	GAMP	1.00	DAA
10/18/04	4901571	DIAZEPAM 5MG	100	Dr.KURT	GAMP	1.00	DAA
10/27/04	2900745	OXYCONTIN 20MG CR	30	Dr.KURT	GAMP	91.39	DAA
10/27/04	2900746	METHADONE 10MG	240	Dr.KURT	GAMP	1.00	DAA
12/23/04	2901052	METHADONE 10MG	100	Dr.KURT	GAMP	1.00	GH
12/23/04	2901053	OXYCODO-APAP 10-325	100	Dr.KURT	GAMP	1.00	GH
01/06/05	4902433	LORAZEPAM 2MG	90	Dr.SHIM	GAMP	1.00	GH
01/18/05	2901168	OXYCODO-APAP 10-325	100	Dr.KURT	GAMP	1.00	GH
01/18/05	2901169	METHADONE 10MG	100	Dr.KURT	GAMP	1.00	GH

Report Date: 06/28/2005

\$112.39

9-21-10-27

980 pills

DO

529-9900 EX. 7116

Innovative Health &amp; Fitness

St. Joseph

Direct Line 448-3099



Jim Doyle  
Governor

WISCONSIN DEPARTMENT OF  
REGULATION & LICENSING



Celia M. Jackson  
Secretary

1400 E Washington Ave  
PO Box 8935  
Madison WI 53708-8935  
Email: [web@drl.state.wi.us](mailto:web@drl.state.wi.us)  
Voice: 608-266-2112  
FAX: 608-266-2264  
TTY: 608-267-2416

February 6, 2007

LINDA STEINKE  
PO BOX 471  
OAK CREEK WI 53154

RE: 06 MED 017, Kenneth Kurt

Dear Ms. Steinke:

Enclosed is a copy of the final decision and order that was issued as a result of the complaint that you filed against Dr. Kurt.

If you have any questions once you have reviewed this order please give me a call or if you have any other questions. My number is (608)267-7139.

Sincerely,

Michelle Schram  
Investigator



STATE OF WISCONSIN  
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF  
DISCIPLINARY PROCEEDINGS AGAINST

**FINAL DECISION AND ORDER**

KENNETH J. KURT, D.O.  
RESPONDENT.

LS 0701242 MED

Division of Enforcement Case #06 MED 17

The parties to this action for the purposes of Wis. Stat. § 227.53, are:

Kenneth J. Kurt, D.O.  
2405 Northwestern Ave. #141  
Racine, WI 53404

Wisconsin Medical Examining Board  
P.O. Box 8935  
Madison, WI 53708-8935

Department of Regulation and Licensing  
Division of Enforcement  
P.O. Box 8935  
Madison, WI 53708-8935

PROCEDURAL HISTORY

The parties in this matter agree to the terms and conditions of the attached Stipulation as the final decision of this matter, subject to the approval of the Board. The Board has reviewed this Stipulation and considers it acceptable.

Accordingly, the Board in this matter adopts the attached Stipulation and makes the following:

FINDINGS OF FACT

1. Respondent Kenneth J. Kurt (dob 5/26/37) is and was at all times relevant to the facts set forth herein an osteopathic physician licensed in the State of Wisconsin pursuant to license #14968, first granted on 7/1/64. Respondent is a general practitioner.

2. On 2/10/06, Respondent's patient health care record of patient J.W., a male born in 1980, was requested by the Department. The request was:

I hereby formally request [...] Copies of any and all medical records, including but not limited to: physical examinations and histories, nurses' notes, progress notes, diagnostic test records, physician's notes and orders, medication orders, operative reports, laboratory reports, prescription and dispensing records, radiology reports, pathology reports, outpatient treatment records, emergency room records, consultation reports and discharge summaries regarding the patient(s) named below: [J.W.]



In response to this request, Respondent's staff sent 11 pages which consisted of Respondent's own progress notes, a laboratory test result showing that the patient had hepatitis C, a privacy policy notice, a work excuse, and a document entitled "Narcotics Agreement."

3. On 12/13/06, Respondent appeared before Departmental personnel with the actual original patient health care record. Respondent provided to the Department, for the first time, progress notes made by another physician who practiced in the clinic part-time, which predated the progress notes furnished earlier, and which notes were available to and considered by Respondent in making his own decisions about the care and treatment of the patient.

4. Between 2/10/06 and 12/13/06, Department staff spent several hours reviewing the incomplete chart, and evaluating it as if it was the complete chart. This time was largely wasted, as the evaluation would have been substantively different had staff known that the chart contained additional physician notes which Respondent had read and incorporated into his own thought process; staff would also have read these notes and incorporated the knowledge into the evaluation.

5. On 8/18/03, a part time associate of Respondent, a Dr. G., first saw patient J.W. at Respondent's clinic. The note reads, in its entirety: "S. MVA 8/8/03 when hit car into tree after running off road to avoid a deer in the road. Seen by me on 8/8/03—day of accident. Given pain meds Endocet and asked to follow up. Wants to FU here with me to get further evaluation and treatment for sore right shoulder. Patient was wearing seat belt. Right should hit steering wheel. No other significant injuries. PH: neg. F.H: neg. Soc: rare ETOH, # cig. O: pleasant and NAD. Wearing right should sling. Right shoulder: ROM limited to <20°. Abdomen tender on palpation entire on[?] shoulder especially at long head of biceps and lesser extent over A and C joint. No clavicular pain except [?] A-C joint. Strength of SS muscles difficult to determine due to limited ability to abduct right arm. A: Rotator cuff injury (suspect ten) @ anterior right shoulder. P: check MRI of right shoulder. Refill Endocet 10/650 #253 and [?] another referral to MRI obtained." A staff noted then reads: "Scheduled MRI of right shoulder at MDI for 8/18/03."

6. On 9/15/03, the patient returned to care with Dr. G., whose note reads, in its entirety: "Stopped in for script for Anx/Per from interferon which he's taking for Hep. C per Dr. Catalino. Dr. C rec'd Paxil and occ'l Ativan and Xanax. He did have a rotator cuff tear but chose to rehab it here at IHF on his own to avoid surgery or he'd like to get into Marikes and this would facilitate that. P: Xanax 0.25mg #30 with three refills, take 1 up to TID. Paxil 20mg, take one qHS, #30 with three refills."

7. The chart contains no entries until a note that the patient cancelled a 3/10/04 appointment. On 3/11/04, the patient returned to care with Dr. G, whose note reads, in its entirety: "Back Pain. S: Moving couch last evening with brother slipped and felt increased pain in right mid-low back with some radiation to right posterior thigh (about half way down). Difficulty sleeping in spite of taking ibuprofen. PH positive for herniated disc. Recent DWI and now on electronic surveillance. Plans on [?] Army and hopes to play football and make it a career. O: usual pleasant, polite self. Back: ROM limited in all directions, especially flexion and leaning to left. Palp: palpable tenderness and spasm in right paraspinal muscles at upper lumbar





area. SLR negative for radicular pain. A: Right midline back pain. P: Percocet 10/600 #20 take one every 406 hours PRN pain. Diazepam 2mg #20 take one every 304 hours PRN pain. [??] in heat packs [??] ibuprofen 600-800 QID ASAP. Note for police: he was here for 1 hr (203 PM)."

8. On 3/17/04, the patient cancelled his appointment. On 2/24/04, the patient returned to care with Dr. G., whose note reads, in its entirety: "S: 23 year old white male whom I've seen in past [??] for right shoulder pain then for LBP and then phone call for K. stone. Today he's most concerned about feeling of increased restlessness, anxiety, disconcertedness, difficulty sleeping and early AM awakening, decreased energy, social isolation, decreased confidence and decreased FUN!! Recently found out from MCW where he's getting monthly interferon that his Hepatitis C may not go away. This could ruin his life plan of joining Marines as a career and he's not got much of a backup plan. He could go to ITT for computers while awaiting decision from Marines on Hep.C. Reminds me that I put him on Paxil Ativan last summer, he discontinued them within 3 months. Paxil made him yawn a lot. Ativan helped. O: Mildly anxious appearing, reasonable affect but slightly flat. A: Anxiety, dep. P: Fluoxetine (Prozac) 20 in the morning, Ativan 1mg twice a day, PRN; increase P.A. to 1/2 hr/d, bike or walk/run. Try to eat more consciously."

9. The chart reflects that the patient rescheduled an appointment from 4/17/04, and then failed to appear for an appointment on 4/21/04. On 6/18/04, the patient returned to care with Dr. G., whose note reads, in its entirety: "4-5 days with rhino and slight cough with phlegm [??], tired and decreased appetite. Increased cough in the evening. History of frequent OM's in past but rare cough. No cigarettes. Concerned about whooping cough in areas. Decreased h[?]. O: Pleasant and NAD. HEENT: WNL's. Lungs: clear. Heart: reg, rhythmic, without murmur. A: Bronchitis. P: doxycycline 1—mg BID x IV d (Delayed Rx 2-3). Phenergan with codeine 4 fl.oz. Add: asked for some lorazepam (Ativan) for anxiety, rec'd #12 @ 1mg strength."

10. The patient returned to care with Dr. G. on 7/9/04, whose note reads, in its entirety: "Wisdom tooth impacted and need root canal, saw Dr. Blocher DDS. Mon Mollack. Lower right gum. Increased pain. P: Endocet 7/5/325 #30. Charged \$10.00"

11. The patient returned to care with Dr. G. on 7/16/04, whose not reads, in its entirety: "Had increased pain and used Endocet already. Ran out yesterday and appointment Tuesday @ 4:15 PM. P: Percocet 10mg #20."

12. On 9/2/04, Respondent first saw patient J.W. Respondent represents to the Board that he reviewed Dr. G's notes regarding the patient, and had at least a brief conversation with Dr. G., at which time it was understood that Respondent would be taking over the care of this patient. Respondent's initial electronic chart note reads, in part: "Neck pain lasting for 2 weeks, MRI shows herniated disc C-6, pain 6/10. Left cervical spine has been very sore for last two weeks. Difficulty sleeping, constant pain. Needs meds for pain and sleep." Respondent charted that he performed osteopathic manipulations to 3-4 body regions (without any further description), and applied traction to the cervical spine. The patient's blood pressure was measured at 120/80, and his heart rate was recorded as 80. The physical examination portion of the chart reads, in its entirety: "Physical Exam: Musculoskeletal spine: Tenderness: cervical spine, thoracic spine; trigger points: cervical spine, thoracic spine." Respondent diagnosed: "Neck Pain 723.1;



Herniation, nucleus pulposus, cervical, 722.0." Respondent prescribed Percocet 10/325 q4-6h x 2 weeks #50; Zanaflex 2mg TID #90; and Mobic 7.5mg 1-2/day #30. Respondent also noted that these are the patient's current medications. Based on the dosage instructions, these medications constitute a 2 week supply. There is no MRI film or report in the patient's health care record.

13. On 9/7/04, the patient returned to care. The chart reflects that the patient signed a "narcotics agreement" providing, among other things, that the patient would receive opioids only from Respondent. The chart note reads, in part: "Neck slightly better, needs OMT. Reports pain is still a 6/10." No vital signs are recorded. Respondent charts that he performed: "Traction: cervical; OMT, 3-4 body regions" without any further description. Respondent diagnoses the patient as follows: "Neck Pain 723.1, Somatic dysfunction, cervical 739.1, somatic dysfunction, thoracic 739.2." Respondent prescribed: Zanaflex 2mg TID #90, Mobic 7.5mg 1-2/day #30, Norco 10/325 q4-6h PRN #100, Avinza 60mg QD #40. Respondent also noted that these are the patient's current medications. Based on the dosage instructions, the medications are a 30-40 day supply.

14. On 9/21/04, the patient returned to care. The chart note reads, in part: "Very upset today, needs to talk to Dr. about personal issues. Concerned about treatment for Hepatitis C." No vital signs are recorded. There are no comments regarding the patient's pain. The chart contains a note that Respondent performed OMT, 3-4 body regions, without further description. The physical exam note reads: "Musculoskeletal; spine: Abnormal: diffuse; swelling: cervical spine, thoracic spine, lumbar spine; Tenderness: cervical spine, thoracic spine, lumbar spine; Trigger Points: cervical spine, thoracic spine, lumbar spine." Respondent's diagnoses are: "Neck pain 723.1, hepatitis C 070.51 See copy of lab work, Somatic dysfunction, lumbar 739.3, Somatic dysfunction, sacral 739.4." Respondent prescribed: methadone 10mg, 2@12-14hrs #100; Roxicodone 10mg 2-3/day #100; and Valium 5mg BID PRN anxiety or spasms #50. These are also listed as the current medications. Based on the dosage instructions, these constitute a 25-30 day supply.

15. On 10/18/04, the patient returned to care. The chart note reads, in part: "Neck stiff, needs OMT and med refills. Pain rated at 6-7 today." No vital signs are recorded. Respondent notes: "OMT, 3-4 body regions" without any further description. Respondent's diagnoses are: "somatic dysfunction, cervical 739.1; somatic dysfunction, thoracic, 739.2." Respondent prescribed methadone 10mg #60; OxyIR 5mg q6h PRN #200; and Valium 5mg 2-3/day PRN anxiety or spasms #100. Given the dosage instructions, these constitute a 50-60 day supply.

16. On 10/27/04, the patient returned to care. The chart note reads, in part: "Med Refill, neck pain, worse 8/10." Respondent performed "traction: cervical. OMT, 3-4 body regions" without further description. The physical examination notes that the patient's eyes are "Normal. Pupils equal, round, reactive to light: Bilateral; good accommodation: Bilateral." The patient's skin is noted as normal. The musculoskeletal examination note is: "Spine: Tenderness: cervical spine, thoracic spine; Trigger points: cervical spine, thoracic spine." Respondent's diagnoses are: "Neck pain 723.1, Herniation, nucleus pulposus, cervical 722.0." Respondent prescribed: OxyContin 20mg q12h PRN pain #30; and methadone 40mg 2-3/day #60. These are



also listed as the patient's current medications. Based on the dosage instructions, the medications constitute a 15-20 day supply.

17. On 12/23/04, the patient returned to care. The chart note reads, in part: "Med Refill minimal amount of meds while in jail. Back pain, incarcerated for alcohol related driving." The patient is recorded as having a blood pressure of 142/96, heart rate of 60, respirations 20, and a weight of 167. The chart notes that the patient received the following in-office treatment: "Stimulation – electric stim ATTENDED BY MD. Packs, hot or cold. OMT, 3-4 body regions" all without further description. The diagnoses are: "Back pain, lumbar 724.2, somatic dysfunction, lumbar 739.3, somatic dysfunction, sacral 739.4 herniated cervical disc. Respondent prescribed: methadone 10mg 2-3/day #100; and Endocet 10mg q3-4h #100. These are also listed as the patient's current medications. Based on the dosage instructions, the medications are a 25-33+ day supply.

18. On 1/18/05, the patient returned to care. The chart note reads, in part: "Needs OMT and med refill. Pain under poor control." The patient is noted as having a blood pressure of 130/90, heart rate of 72, respirations of 20, and weight of 164. The chart records that the patient received "OMT, 3-4 body regions" without further description. The diagnoses are as recorded in the 12/23/05 note. Respondent prescribed: Percocet 10/325 q4-6h #100; methadone 10mg 2-3/day #100; and Valium 5mg BID PRN anxiety or spasms #60. These are also listed as the current medications. Based on the dosage instructions, this is a 16-33+ day supply.

19. Respondent's conduct in the care and treatment of this patient fell below the minimum standard of conduct for the profession in the following respects:

- a. At no time does the chart reflect that the patient receive a comprehensive history and physical examination, including an AODA history, before chronic opioid analgesic therapy was initiated.
- b. At no time does the chart reflect that the patient referred for evaluation of alcohol or other drug abuse, dependence, or addiction.
- c. At no time does the chart reflect that the patient asked about the effectiveness of the therapies provided.
- d. At no time does the chart reflect that the patient referred for physical therapy, evaluation for surgery, or any other alternative therapy.
- e. When the patient informs Respondent of likely substance abuse, in that he is in jail for alcohol related driving, there is no followup to this highly relevant information.
- f. There is no description of what the osteopathic manipulations were, to what parts of the body were they performed, or the effectiveness of this treatment modality. There is no description of the length of time or the weight or tension level used for each cervical traction treatment, or the effectiveness of this treatment modality.
- g. There is no explanation given for the changes in medications and dosages prescribed.
- h. Respondent was given new prescriptions for additional opioids when his current supply was adequate to carry him, and there is no medication sheet or other



tracking of the medication supplied to the patient to determine if early refills were being requested or provided.

- i. There is no recorded consultation with the pharmacy selected by the patient, to determine if other practitioners were providing prescriptions for controlled substances to the patient.
- j. At no time does the chart reflect that functional goals were established for the patient, nor does the chart reflect any progress noted towards achieving such goals.
- k. At no time does the chart reflect that alternative modes of treatment are noted as being offered to, or discussed with, the patient.
- l. Long-acting products like OxyContin® are never dosed "PRN" but are always taken on a scheduled basis.

20. Respondent's conduct created the following unjustifiable risks to the health, safety or welfare of the patient or the public:

- a. The patient was provided with early refills on multiple occasions, creating the risk of diversion or overconsumption for non-medical reasons.
- b. The patient may fail to improve because appropriate treatment is not provided, including neuromodulators, NSAIDs, physical therapy, blocks, surgery, or other modalities.
- c. Dosing a long-acting pain medication on a PRN basis results in the patient's receiving inadequate relief in that the patient is "chasing" the pain rather than staying ahead of it, as such products are designed to do.

21. A minimally competent physician would have avoided these risks by taking the following steps:

- a. A careful initial history and physical examination would be conducted and charted, to determine the cause(s) of the patient's pain and what treatments had failed, or were effective. An AODA assessment or evaluation would be conducted before initiating chronic opioid analgesic therapy, and upon disclosure of any information suggesting a history of such abuse (including, but not limited to, disclosure of being "incarcerated for alcohol related driving").
- b. The alternatives available to the patient would be discussed with the patient, and the chart would record the choices made, with reasons for those choices.
- c. A treatment plan with clear functional goals would be devised and charted, and progress towards achieving those goals would be charted on each return visit. Changes in therapy, such as in medications, would be clearly noted, together with the indication for the change.
- d. Long-acting opioids would be dosed on a scheduled basis, so that the patient's pain was well controlled around the clock, with short-acting products being provided for limited use for flare up pain, PRN.
- e. A medication sheet would be used to record the days supply of medication provided to the patient.
- f. The pharmacy used by the patient would be consulted to determine if the patient was complying with the "narcotics agreement." Collateral sources, such as the





patient's family and girlfriend, would be consulted if there was doubt on this issue.

- g. On any occasion when the patient appeared to be using more medication than prescribed, the patient would be questioned about his use, and counseled appropriately. Repeated overuse would have led to appropriate action by the prescriber, including ruling out of pseudoaddiction, and consideration of other medications such as NSAIDs, neuromodulators, and SSRIs; and consideration of other modes of treatment.
- h. When osteopathic manipulations or traction were performed, details would be charted such as the location of the treatment, the exact nature of the manipulation provided, and an indication of the efficacy of the treatment. When cervical traction was applied, the length of the treatment and the tension applied would be recorded, together with a statement about the efficacy of the treatment.

### CONCLUSIONS OF LAW

A. The Wisconsin Medical Examining Board has jurisdiction to act in this matter pursuant to Wis. Stat. § 448.02(3), and is authorized to enter into the attached Stipulation pursuant to Wis. Stat. § 227.44(5).

B. The conduct described in 2-4, above, violated Wis. Adm. Code Med § 10.02(2)(zc). The conduct described in 12-20, above, violated Wis. Adm. Code §§ Med 10.02(2)(h) and 18.05. Such conduct constitutes unprofessional conduct within the meaning of the Code and statutes.

### ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that the attached Stipulation is accepted.

IT IS FURTHER ORDERED, that Kenneth J. Kurt, D.O., is REPRIMANDED for his unprofessional conduct in this matter.

IT IS FURTHER ORDERED, that the license to practice medicine and surgery of Respondent is LIMITED as provided in Wis. Stat. § 448.02(3)(e), and as follows: Respondent shall not order, prescribe, or administer any opioid or opiate, including any product containing tramadol, for more than 30 days in any 12 month period, for any patient. Notwithstanding this limitation, Respondent may prescribe FDA approved buprenorphine products to patients for the purpose of office based opioid treatment (OBOT), within the labeling of Subutex® and Suboxone®.

IT IS FURTHER ORDERED, that the license to practice medicine and surgery of Respondent is LIMITED as provided in Wis. Stat. § 448.02(3)(e), and as follows: Respondent shall take and successfully complete the "Intensive Course in Medical Record Keeping with Individual Preceptorships," offered at the Case Western Reserve University, School of Medicine, Continuing Medical Education Program, on June 7-8, 2007. Respondent shall arrange for the



course sponsor to transmit information concerning his performance directly to the Department Monitor, and shall authorize the Board or designee to confer with CWRU staff concerning his performance and behavior. Respondent may propose an alternative course which is substantially equivalent to this offering, which may be approved by the Board or its designee.

IT IS FURTHER ORDERED, that respondent shall pay the COSTS of investigating and prosecuting this matter of \$2,100 within 120 days of this Order.

IT IS FURTHER ORDERED, that pursuant to Wis. Stats. §§ 227.51(3) and 448.02(4), violation of any of the terms of this Order may be construed as conduct imperiling public health, safety and welfare and may result in a summary suspension of Respondent's license. The Board in its discretion may in the alternative impose additional conditions and limitations or other additional discipline for a violation of any of the terms of this Order, following notice and an opportunity to be heard. In the event Respondent fails to timely submit any payment of the Costs as set forth above, Respondent's license SHALL BE SUSPENDED, without further notice or hearing, until Respondent has paid them in full.

Dated this January 24, 2007.

WISCONSIN MEDICAL EXAMINING BOARD

by: 

a member of the Board

akt  
i:\kurt.stp.doc



STATE OF WISCONSIN  
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY  
PROCEEDINGS AGAINST

KENNETH J. KURT, D.O.  
RESPONDENT.

STIPULATION

LS 0701242 MED

Division of Enforcement Case #06 MED 17

It is hereby stipulated between the above Respondent and the undersigned prosecuting attorney for the Division of Enforcement of the Department of Regulation and Licensing, as follows:

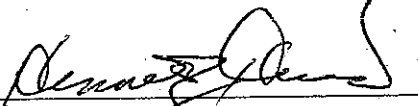
1. This Stipulation is entered into as a result of a pending investigation of Respondent's licensure by the Division of Enforcement. Respondent consents to the resolution of this investigation by stipulation and without the issuance of a formal complaint.
2. Respondent understands that by signing this Stipulation, Respondent voluntarily and knowingly waives significant rights, including: the right to a hearing on the allegations against Respondent, at which time the state has the burden of proving those allegations by a preponderance of the evidence; the right to confront and cross-examine the witnesses against Respondent; the right to call witnesses on Respondent's behalf and to compel their attendance by subpoena; the right to testify personally; the right to file objections to any proposed decision and to present briefs or oral arguments to the officials who are to render the final decision; the right to petition for rehearing; and all other applicable rights afforded under the United States Constitution, the Wisconsin Constitution, the Wisconsin Statutes, the Wisconsin Administrative Code, and any other provisions of state or federal law.
3. Respondent has been provided with the opportunity to obtain advice of legal counsel prior to signing this stipulation.
4. Respondent agrees to the adoption of the attached Final Decision and Order by the Medical Examining Board. The parties to the Stipulation consent to the entry of the attached Final Decision and Order without further notice, pleading, appearance or consent of the parties. Respondent waives all rights to any appeal of the Board's order, if adopted in the form as attached.
5. If the terms of this Stipulation are not acceptable to the Board, the parties shall not be bound by the contents of this Stipulation, and the matter shall be returned to the Division of Enforcement for further proceedings. In the event that this Stipulation is not accepted by the Board, the parties agree not to contend that the Board has been prejudiced or biased in any manner by consideration of this attempted resolution.
6. The parties to this Stipulation agree that the attorney or other agent for the Division of Enforcement and any member of the Medical Examining Board ever assigned as an advisor in this investigation may appear before the Board in open or closed session, without the presence of the Respondent or Respondent's attorney, for purposes of speaking in support of this



agreement and answering questions that any member of the Board may have in connection with the Board's deliberations on the Stipulation. Additionally, any such Board advisor may vote on whether the Board should accept this Stipulation and issue the attached Final Decision and Order.

7. Respondent is informed that should the Board adopt this Stipulation, the Board's final decision and order is a public record and will be published in accordance with standard Department procedure.

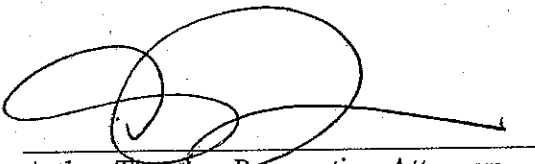
8. The Division of Enforcement joins Respondent in recommending the Board adopt this Stipulation and issue the attached Final Decision and Order.



Kenneth J. Kurt, D.O.  
2405 Northwestern Ave. #141  
Racine, WI 53404

Date

Jan 2, 2007



Arthur Thexton, Prosecuting Attorney  
Division of Enforcement  
Wisconsin Department of Regulation and Licensing  
P.O. Box 8935  
Madison, WI 53708-8935

Date

1/5/07





John Zachar  
5921 Sugarbush Court  
Greendale, WI 53129

Dear Senator Erpenbach,

I am writing to ask that you please support the Family Justice Bill SB138. Anyone who has lost a family member understands that the grief of loss is not a function of the age of the person. In January 2001 I lost my mother. She was as kind and loving of a person as you could ever want. I had taken her for a scheduled medical exam on a Thursday. My mother collapsed during that exam, she could not sit upright on the examining table. Even though the doctor's office was right next door to a hospital the doctor told me to take her home. The next day (Friday) I received a phone call from the doctor's office telling me to take her to a hospital because a blood test revealed that one of the prescribed drugs my mother was taking was at too high a level. The doctor never visited my mother in the hospital and by the next morning (Saturday) she was dead. A nurse told me that the blood level of the prescribed drug (Digoxin) was three times higher than a lethal level and yet no one ordered a transfusion or any other procedure. They just let her sit in her room and waste away. Under the current interpretation of malpractice law there was nothing legally I could do. Passing The Family Justice Bill will not soften my grief but at least it may help hold doctors accountable for their actions in the future.

This is a picture of my mother taken a few months before she died. You can see how vibrant and happy she was.



Thank you,  
John Zachar



October 16, 2007

TO: Senator Jon Erpenbach  
Chairman, Senate Health and Human Services Committee  
RE: SB138

Dear Senator Erpenbach:

We ask that this letter be included as part of the committee record for SB 138. We are unable to attend the hearing Oct. 17, 2007, but have written this letter to show our support of the bill.

This summer we lost our father. His illness and death were a very trying experience that involved lost lab tests, confusing diagnoses from various doctors, ineffective treatments and dismissal of our concerns by the medical community.

You can imagine our astonishment when we learned that, because our father was a widower and we were all adult children, we had little recourse under the current law. We have since learned that Wisconsin is the *only state* to bar adult children from recovery in medical malpractice wrongful death cases.

We no longer are able to enjoy Dad's storytelling or to accompany him to church. He won't be riding the lawnmower, which he did this spring, to keep his youngest daughter's yard in shape. He won't be able to test us with a few difficult words of the day's crossword puzzle, to discuss college football, to join us for breakfast or to go for a ride in the country.

This is wrong.

Today, more adult children are helping to take care of, provide companionship for and watch over the many needs of their elderly parents. They need to have standing, to have recourse if a parent dies as a result of medical malpractice.

We strongly support Senate Bill 138 and ask you to approve it.

Thank you for your time.

Sincerely,

Erin Haanen, Green Bay  
Maureen Blaney Flietner, Hilbert  
Kathleen Blaney, Green Bay

...  
...  
...  
...  
...

...  
...  
...  
...  
...

...  
...  
...  
...  
...

...  
...  
...  
...  
...

...  
...  
...  
...  
...

...  
...  
...  
...  
...



# Family Justice Network



## Doctor Perforates Aorta During Pacemaker Wire Placement Family Has No Remedy



**Ellen C. Kachar**  
Milwaukee, WI  
1932-2000

### *As Told By Her Daughter, Sherry*

My mother was Ellen C. Kachar. She died January 11, 2000 at the age of 67. My mother was a widow and had three children, my two brothers and I. We are all adults with families.

On January 11, 2000, my mother went into the hospital for a pacemaker implantation procedure. The doctor told us this would be "a simple procedure." As I sat in my mother's hospital room waiting for her to return, a woman entered the room. I was taken down four floors, there doctors told me that "something" had happened. They didn't know what or why, but it didn't look good. It wasn't; my mother died.

My brothers and I sat next to her lifeless body trying to absorb the unbearable and unbelievable reality that we would have to go on with our lives without the one person who made it complete. After much discussion and difficulty, we decided to have an autopsy performed.

When we called the Medical Examiner's office the next day we found out the reason for my mother's death: Doctors punctured her lung and then, disregarding her complaints of pain and the staff's warning that something was wrong, proceeded to puncture her aorta, causing her to

bleed to death. The most horrible thing to learn was my mother was awake during the whole procedure!

Our mother's death demands answers and accountability. Imagine our shock when we discovered Wisconsin does not allow an adult child or the parent of an adult child to bring a wrongful death claim if the death is caused by medical malpractice.

Our mother's death has been devastating to our family and changes our lives forever. If the doctor performing the pacemaker implantation had instead caused an auto accident killing my mother, my brothers and I would be able to bring a wrongful death claim. Why are careless doctors protected from full accountability?

Our mother will not share her life with her children or her seven grandchildren. We are now forced to live without her love, aid, comfort, love and affection.

If this law remains, we are saying it is okay to kill someone and nothing will happen as a result. That is wrong. We need Wisconsin to restore the ability of all Wisconsin families to seek justice and accountability for the death of a loved one. Please don't let our mother's death be in vain.

*Pending state legislation, the Family Justice Bill (Senate Bill 138) will restore the remedies of adult children and the parents of adult children, allowing them to once again bring a claim for wrongful death when the death is caused by medical malpractice.*

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

State of Wisconsin, Plaintiff-Respondent, v. Denis L.R., Defendant, Dawn R.,  
Intervenor-Petitioner-Appellant-Petitioner.

Case No.: 2003AP384-CR

SUPREME COURT OF WISCONSIN

2005 WI 110; 283 Wis. 2d 358; 699 N.W.2d 154; 2005 Wisc. LEXIS 349

January 5, 2005, Oral Argument  
July 8, 2005, Opinion Filed

**PRIOR HISTORY:** REVIEW of a decision of the Court of Appeals. Appeals. 270 Wis. 2d 663, 678 N.W.2d 326, 2004 WI App 51 Reported at: 270 Wis. 2d 663, 678 N.W.2d 326, 2004 WI App 51 (Ct. App. 2004-Published). (L.C. No. 02CF235). Court: Circuit. County: Sheboygan. Judge: Gary Langhoff. State v. Denis L.R., 270 Wis. 2d 663, 678 N.W.2d 326, 2004 WI App 51, 2004 Wisc. App. LEXIS 102 (2004).

**DISPOSITION:** Affirmed and cause remanded for further proceedings consistent with this opinion.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Appellant mother, an intervenor in defendant's criminal case, sought review of the decision of the Court of Appeals (Wisconsin), which affirmed the circuit court's order concluding that the mother waived the therapist-patient privilege of her three-year-old daughter.

**OVERVIEW:** The child received counseling and told her therapist that her grandfather sexually assaulted her. The clinical director reported the sexual assault to the authorities. The mother overheard the child tell the therapist that the grandfather did not sexually assault her; the mother relayed that information to her grandmother. The circuit court conducted an in-camera review of the counseling records to look for any information that either inculpated or exculpated the grandfather and found nothing. At issue in the case was whether the circuit court could conduct an in camera interview of the therapist. The appellate court concluded that the mother waived the privilege, but the supreme court affirmed on other grounds pursuant to Wis. Stat. §§ 48.981 and 905.04 (2001-02). It concluded that there was no privilege because an examination of the child created a reasonable ground for an opinion that she was abused and that her abuse was other than accidentally caused or inflicted by another. Because there was no privilege with respect to any communications she made for purposes of mental health treatment related to the sexual abuse, there was no need for an in camera review of the therapist.

**OUTCOME:** The court affirmed the appellate court's decision on other grounds.

**CORE TERMS:** patient's, counselor, guardian, counseling, sexual assault, child abuse, waived, abused, in camera, sexually, neglect, reporting, reasonable ground, waive, counseling sessions, butt, overheard, appointed, neglected, session's,


confidential communications, privileged, therapist, suspicion, provider, therapy, mental health, health care, accidentally, disclose

## LEXISNEXIS® HEADNOTES


 [Hide](#)


[Healthcare Law](#) > [Business Administration & Organization](#) > [Patient Confidentiality](#) > [General Overview](#) 

[Healthcare Law](#) > [Treatment](#) > [Patient Consent](#) > [Informed Consent](#) 

**HN1**  See [Wis. Stat. § 146.82\(2\)\(a\)\(11\)](#) (2001-02).

[Estate, Gift & Trust Law](#) > [Probate](#) > [General Overview](#) 


[Evidence](#) > [Privileges](#) > [Psychotherapist-Patient Privilege](#) > [General Overview](#) 


**HN2**  See [Wis. Stat. § 905.04\(3\)](#) (2001-02).


[Civil Procedure](#) > [Appeals](#) > [Standards of Review](#) > [De Novo Review](#) 


[Governments](#) > [Courts](#) > [Rule Application & Interpretation](#) 

[Governments](#) > [Legislation](#) > [Interpretation](#) 


**HN3**  The interpretation of court rules present questions of law, which are reviewed independently. When courts interpret court rules, they turn to the rules of statutory construction for guidance. The courts assume that the legislature's and the court's intent is expressed in the language of the statute and rule. Therefore, courts begin with the language of the statute or rule. Generally, language is given its common, ordinary, and accepted meaning. Further, courts consider language in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results. Unless this interpretive process yields an ambiguity, the inquiry ends. [More Like This Headnote](#)  
| [Shepardize: Restrict By Headnote](#)


[Evidence](#) > [Privileges](#) > [General Overview](#) 

**HN4**  [Wis. Stat. § 905.04\(2\)](#) (2001-02) provides the general rule of privilege. [More Like This Headnote](#)


[Evidence](#) > [Privileges](#) > [General Overview](#) 





[Healthcare Law](#) > [Business Administration & Organization](#) > [Patient Confidentiality](#) > [General Overview](#) 


**HN5**  See [Wis. Stat. § 905.04](#) (2001-02).


[Evidence](#) > [Privileges](#) > [Doctor-Patient Privilege](#) > [Scope](#) 


[Evidence](#) > [Privileges](#) > [Psychotherapist-Patient Privilege](#) > [Exceptions](#) 

[Evidence](#) > [Privileges](#) > [Psychotherapist-Patient Privilege](#) > [Scope](#) 


**HN6**  The therapist-patient privilege in [Wis. Stat. § 905.04\(2\)](#) (2001-02) is a testimonial rule of evidence. The overriding purpose of the therapist-patient privilege is to prevent the unnecessary disclosure of "confidential" information. The public policy underpinning this privilege is to encourage patients to freely and candidly discuss mental health concerns with their therapists by ensuring that those concerns will not be unnecessarily disclosed to third persons. However, this privilege is not absolute. Aside from the fact that statutory privileges are to be strictly and narrowly construed, there are a number of exceptions to the therapist-patient privilege set forth in [§ 905.04\(4\)](#). One of those exceptions, [§ 905.04\(4\)\(e\)\(2\)](#), concerns child abuse. [More Like This](#)  
[Headnote](#)


[Evidence](#) > [Privileges](#) > [Psychotherapist-Patient Privilege](#) > [General Overview](#) 

**HN7**  See [Wis. Stat. § 905.04\(4\)\(e\)\(2\)](#) (2001-02).


[Criminal Law & Procedure](#) > [Criminal Offenses](#) > [Crimes Against Persons](#) > [Domestic Offenses](#) > [Child Abuse](#) > [Elements](#) 


[Evidence](#) > [Privileges](#) > [Psychotherapist-Patient Privilege](#) > [General Overview](#) 

**HN8**  While there are no Wisconsin cases interpreting [Wis. Stat. § 905.04\(4\)\(e\)\(2\)](#) (2001-02) as applying to other than child abuse juvenile litigations, a plain reading would appear to include any case where a child is injured other than accidentally. The child abuse exception applies when three criteria are satisfied. [More Like This](#) [Headnote](#)


[Civil Procedure](#) > [Discovery](#) > [Methods](#) > [General Overview](#) 


[Family Law](#) > [Family Protection & Welfare](#) > [Children](#) > [General Overview](#) 

**HN9**  The first criterion in regard to the applicability of the child abuse exception requires an "examination" of the child to have occurred. There is no requirement that any particular person conduct the examination, as Wis. Stat. § 905.04(4)(e)(2) (2001-02) requires only that an examination occurred. An examination is the act or process of examining or state of being examined. To "examine," in turn, means to test by an appropriate method to look over: inspect visually or by use of other senses. To inspect or test for evidence of disease or abnormality. To inquire into the state of especially by introspective processes. Thus, the term "examination" refers to and can encompass a wide variety of exploratory practices. The second criterion requires that the examination create a reasonable ground for an opinion of the enumerated providers that the child has been abused or neglected. The third criterion requires that the opinion must relate to abuse or neglect that was caused by means other than accident or infliction by another. "Abuse" is broadly defined in Wis. Stat. § 48.02(1) (2001-02). When these criteria are satisfied, Wis. Stat. § 905.04(4)(e)(2) states that there is no privilege. The "privilege" applies to confidential communications made or information obtained or disseminated for purposes of treatment of the patient's mental or emotional condition, § 905.04(2). [More Like This Headnote](#)


[Criminal Law & Procedure](#) > [Criminal Offenses](#) > [Crimes Against Persons](#) > [Domestic Offenses](#) > [Child Abuse](#) > [Elements](#) 

[Evidence](#) > [Privileges](#) > [Psychotherapist-Patient Privilege](#) > [General Overview](#) 

[Family Law](#) > [Family Protection & Welfare](#) > [Children](#) > [Abuse, Endangerment & Neglect](#) 


**HN10**  According to Wis. Stat. § 48.981(2) (2001-02), counselors are legally required to report to the authorities if the counselor has reasonable cause to suspect that the child has been abused or neglected. Section 48.981(3)(a) further requires the counselor to inform the authorities of the facts and circumstances contributing to a suspicion of child abuse or neglect. Reports and records of suspected child abuse, even though confidential, may be reported to law enforcement officers and agencies, as well as a district attorney, for purposes of investigation or prosecution, § 48.981(7)(a)(8). [More Like This Headnote](#)


[Evidence](#) > [Privileges](#) > [Psychotherapist-Patient Privilege](#) > [General Overview](#) 


**HN11**  See Wis. Stat. § 48.981(2)(a) (2001-02).


[Criminal Law & Procedure](#) > [Appeals](#) > [Standards of Review](#) > [General Overview](#) 


[Evidence](#) > [Testimony](#) > [Experts](#) > [Ultimate Issue](#) 


[Family Law](#) > [Family Protection & Welfare](#) > [Children](#) > [Abuse, Endangerment & Neglect](#) 


**HN12**  The test to suspect whether a child has been abused or neglected is whether a prudent person would have had reasonable cause to suspect child abuse if presented with the same totality of circumstances as that acquired and viewed by the defendant. "Suspicion" means a belief or opinion based upon facts or circumstances which do not amount to proof. The "reasonable cause to suspect" standard ultimately involves a belief, based on evidence but short of proof, that an ordinary person would reach as to the existence of child abuse. A counselor's reporting requirement centers on a reasonable belief or opinion based on the totality of circumstances that the child has been abused. This test is analogous to Wis. Stat. § 905.04(4)(e)(2)'s (2001-02) "reasonable ground for an opinion" standard. Where a counselor reports child abuse under Wis. Stat. § 48.981(2) and (3) (2001-02), that counselor has expressed a reasonable ground for an opinion that the abuse or neglect was other than accidentally caused or inflicted by another. Wis. Stat. § 905.04(4)(e)(2). The counselor's opinion is not necessarily the equivalent of an expert's testimonial opinion that answers an ultimate issue of fact, which ordinarily must be stated to a reasonable degree of certainty. [More Like This Headnote](#)


[Evidence](#) > [Privileges](#) > [General Overview](#) 


**HN13**  Those required to report under Wis. Stat. § 48.981 (2001-02) include many persons not mentioned in Wis. Stat. § 905.04(4)(e)(2) (2001-02). [More Like This Headnote](#)


[Criminal Law & Procedure](#) > [Criminal Offenses](#) > [Crimes Against Persons](#) > [Domestic Offenses](#) > [Domestic Assault](#) > [Elements](#) 


[Evidence](#) > [Privileges](#) > [Psychotherapist-Patient Privilege](#) > [General Overview](#) 

[Healthcare Law](#) > [Business Administration & Organization](#) > [Patient Confidentiality](#) > [General Overview](#) 


**HN14**  Wis. Stat. § 905.04(2) (2001-02) states that "privilege" refers to confidential communications made or information obtained or disseminated for purposes of treatment of the patient's mental or emotional condition. [More Like This Headnote](#)

[Evidence](#) > [Privileges](#) > [Doctor-Patient Privilege](#) > [General Overview](#) 


[Evidence](#) > [Privileges](#) > [Psychotherapist-Patient Privilege](#) > [General Overview](#) 

[Healthcare Law](#) > [Business Administration & Organization](#) > [Patient Confidentiality](#) > [General Overview](#) 

**HN15** Information covered by the evidentiary privilege statute, Wis. Stat. § 905.04 (2001-02), and confidentiality of records statute, Wis. Stat. § 146.82 (2001-02), will overlap in many instances because a patient's health care record under § 146.82 may often include a record of a confidential communication between the patient and a health care provider under Wis. Stat. § 905.04. Although Wis. Stat. §§ 146.82 and 905.04 are recited in different chapters of the statutes, they both address the confidential or privileged status of health care information and communications. Accordingly, they must be read together in pari materia to avoid any conflicts, as they represent a collective statement as to the reach and limits of the confidentiality and privilege which attach to such records or communications. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Evidence](#) > [Scientific Evidence](#) > [Battered Child Syndrome](#) 

[Family Law](#) > [Family Protection & Welfare](#) > [Children](#) > [Abuse, Endangerment & Neglect](#) 

[Healthcare Law](#) > [Business Administration & Organization](#) > [Patient Confidentiality](#) > [General Overview](#) 

**HN16** Wis. Stat. § 146.82(2)(a)(11) (2001-02) provides that a patient's health care records shall be released to a district attorney for purposes of investigation of threatened or suspected child abuse or neglect or for purposes of prosecution of alleged child abuse or neglect, if the person conducting the investigation or prosecution identifies the subject of the record by name. Those records can then be disclosed for purposes of investigation or prosecution. Wis. Stat. § 48.981(7)(a)(8) (2001-02). [More Like This Headnote](#)

**COUNSEL:** For the intervenor-petitioner-appellant-petitioner there were briefs by Dwight D. Darrow and Darrow, Dietrich & Hawley, S.C., Sheboygan, and oral argument by Dwight D. Darrow.

For the plaintiff-respondent the cause was argued by Sandra L. Nowack, assistant attorney general, with whom on the brief was Peggy A. Lautenschlager, attorney general.

**JUDGES:** LOUIS B. BUTLER, JR., J.

**OPINION BY:** LOUIS B. BUTLER, JR.

## OPINION

**[\*\*361] [\*\*\*156] [\*P1]** LOUIS B. BUTLER, JR., J. Dawn R. seeks review of a published court of appeals decision that affirmed a circuit court's order that concluded Dawn waived the therapist-patient privilege of her three-year-  
**[\*\*362]** old daughter, Kirstin R., by volitionally disclosing a significant part of the matter or communication. \*

## FOOTNOTES

<sup>1</sup> State v. Denis L.R., 2004 WI App 51, 270 Wis. 2d 663, 678 N.W.2d 326.

**[\*P2]** Kirstin received counseling at Choices Family Education Services (Choices Family Services). There, she told her therapist, Judy Droppers, that her grandfather, Denis L.R., sexually assaulted her. Brian Fears, the clinical director at Choices Family Services, reported the sexual assault to the authorities, and the State charged Denis with sexually assaulting Kirstin.

**[\*P3]** Dawn, who is also Denis's daughter, overheard Kirstin tell Droppers that Denis did not sexually assault her. Dawn relayed this information to her grandmother, Helen R. The circuit court conducted an in camera review of Kirstin's counseling records to look for any information that either inculcates or exculpates Denis. Apparently, the court found no information.

**[\*P4]** At issue in this case is whether the circuit court may conduct an in camera interview of Droppers. Since Dawn overheard Kirstin tell Droppers that Denis both did and did not sexually assault her, Droppers may have information that is relevant to both the State and Denis that, for some reason, Droppers did not reduce to writing.

**[\*P5]** After the circuit court concluded that Dawn waived Kirstin's privilege by telling Helen about what Dawn overheard, the court ordered an in camera interview with Droppers to determine if she had any relevant information related to the sexual assault. Dawn intervened in this criminal action to protect Kirstin's therapist-patient privilege. As noted, the court of appeals affirmed the circuit court's order by concluding that Dawn waived Kirstin's privilege.

**[\*\*363] [\*P6]** Dawn argues the court of appeals decision should be reversed because she contends she could not claim Kirstin's privilege, as she is not Kirstin's "guardian" for purposes of Wis. Stat. § (Rule) 905.04(3) (2001-02). <sup>2</sup> Alternatively, Dawn argues that she could not have waived Kirstin's privilege because she did not intend to waive the privilege.

## FOOTNOTES

<sup>2</sup> All references to the Wisconsin Statutes are to the 2001-02 version, unless otherwise noted.

**[\*P7]** We do not address these issues regarding waiver because we conclude that there is no privilege here. Fears reported the sexual assault to the authorities, presumably pursuant to his mandatory reporting obligations under Wis. Stat. § 48.981. Under the circumstances presented, we conclude that Fears' reporting the abuse to the authorities under Wis. Stat. § 48.981 extinguishes Kirstin's privilege under Wis. Stat. (Rule) § 905.04(4)(e)2. Thus, there is no privilege with respect to

any "confidential communications made or information obtained or **[\*\*157]** disseminated for purposes of . . . treatment of the patient's . . . mental or emotional condition . . . " with respect to the sexual abuse. See Wis. Stat. (Rule) § 905.04(2). Therefore, any information the counselors at Choices have that is relevant to the prosecution or defense of Denis for the sexual assault is not privileged. Accordingly, we affirm the decision of the court of appeals on other grounds.

I

**[\*P8]** On May 6, 2002, the State charged Denis L.R. with repeated first-degree sexual assault of his granddaughter, Kirstin. See Wis. Stat. §§ 948.02(1) and 948.025(1). Kirstin was three years old. Dawn is Denis's daughter and Kirstin's mother.

**[\*\*364] [\*P9]** The authorities first learned of the sexual assaults when Fears, the clinical director at Choices Family Services reported that Kirstin made statements during counseling that indicated that Denis sexually assaulted her on several occasions.

**[\*P10]** Denis's preliminary hearing was held on May 15, 2002. At the hearing, a social worker testified that she spoke with Kirstin on May 4, 2002. The social worker testified that Kirstin told her that "Papa," referring to Denis, put his "butt" in Kirstin's "butt." Through the use of anatomical drawings, Kirstin identified that "butt" referred to her and Denis's genitalia. The Sheboygan County Circuit Court, Honorable Timothy M. Van Akkeren, bound Denis over for trial and the State filed an information charging Denis with the same crime as stated in the criminal complaint.

**[\*P11]** At one point, Dawn consented to release Kirstin's medical and hospital records and her counseling records from Choices Family Services to the State, presumably to aid the prosecution of Denis. However, she revoked this consent before the State obtained any of the records.

**[\*P12]** Denis then filed a Shiffra<sup>3</sup> motion for in camera inspection of, among other records, Kirstin's counseling records from Choices. As part of his materiality showing, Denis submitted an affidavit by Helen (Denis's mother, Dawn's grandmother, and Kirstin's great-grandmother). Helen averred that she "had discussions with Dawn regarding counseling services provided to Kirstin." During those discussions, Dawn told Helen "that Kirstin had been seeing a counselor by the name of Judy Droppers at Choice Family Services . . . **[\*\*365]** on two or more occasions in May or June, 2002." <sup>4</sup> Helen stated that Droppers "used play therapy, and in one of those sessions talked about some of the allegations surrounding the criminal investigation in this case." Helen further indicated that "according to Dawn, on one occasion, Kirstin informed the counselor that nothing happened between her and [Denis], contrary to the allegations underlying the criminal case."

#### FOOTNOTES

<sup>3</sup> State v. Shiffra, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993)

4 The parties do not dispute that any communications between Kristin and Droppers fall under the counselor-patient privilege, regardless of whether Droppers is a family therapist, professional counselor, or other mental health professional.

**[\*P13]** The State did not object to Denis's Shiffra motion, noting that it too needed the records to aid the prosecution of its case.

**[\*P14]** The circuit court, Honorable Gary Langhoff, ordered the State, to the extent it was legally capable of doing so under Wis. Stat. § 146.82(2)(a)11., (2001-02) <sup>5</sup> to **\*\*\*158** obtain all records relating to Kirstin from Choices Family Services. The court stated that it would then **\*\*366** make further orders regarding any in-camera interviews with the counselors from Choices Family Services.

#### FOOTNOTES

<sup>5</sup> Wisconsin Stat. § 146.82(2)(a)11. states:

**HN1** <sup>6</sup>Notwithstanding sub. (1), patient health care records shall be released upon request without informed consent in the following circumstances:

...

To a . . . district attorney for purposes of investigation of threatened or suspected child abuse or neglect or suspected unborn child abuse or for purposes of prosecution of alleged child abuse or neglect, if the person conducting the investigation or prosecution identifies the subject of the record by name. The health care provider may release information by initiating contact with a county department, sheriff or police department or district attorney without receiving a request for release of the information. A person to whom a report or record is disclosed under this subdivision may not further disclose it, except to the persons, for the purposes and under the conditions specified in s. 48.981 (7).

**[\*P15]** Choices reluctantly turned the records over to the State after the court issued a subpoena duces tecum. <sup>6</sup> The court examined the records in camera but

apparently did not find any inculpatory information pertaining to the sexual assault allegations or exculpatory information regarding Kirstin's alleged recantation. <sup>7</sup>

#### FOOTNOTES

<sup>6</sup> According to the cover letter and the affidavit, both dated September 13, 2002, the State's subpoena duces tecum was requested pursuant to Wis. Stat. § 146.82(2)(a)11. The subpoena was issued by the court pursuant to Wis. Stat. §§ 968.135 (the general statute regarding criminal subpoenas for documents) and 146.82(2)(a)11.

<sup>7</sup> The subpoena duces tecum instructed Choices Family Services to turn over all records relating to Kirstin's counseling she received at Choices Family Services. Those counseling records have not been made part of the appellate record. Therefore, we cannot determine what the circuit court viewed in camera or what information is contained in those counseling records.

**[\*P16]** The State later moved to allow Kirstin to testify through videotaped deposition. At the motion hearing, on October 9, 2002, the State also raised the issue of whether Dawn waived Kirstin's privilege. The State took the position that she waived the privilege based on the information contained in Helen's affidavit, which was previously submitted by Denis with his Shiffra motion, and based on similar statements Dawn made to the assistant district attorney who was prosecuting the case. As noted above, Dawn had stated that **[\*\*367]** Kirstin contradictorily told her counselors at Choices Family Services that Denis did and did not sexually assault her. Because that information went to the core of the counseling sessions, the State argued that Dawn waived Kirstin's privilege.

**[\*P17]** Denis opposed the State, arguing that Dawn did not disclose any significant part of any matter or communication because there were multiple purposes for Kirstin attending the counseling sessions and because the statements Dawn made regarding what Kirstin stated were relatively brief in time compared with the length of the overall sessions. At the motion hearing, Dawn testified that she took Kirstin and her sibling to Choices to receive counseling for "possible allegations of sexual assault and for [the] children to vent out other issues," including school problems and "stressors in the family." She stated that the children had two counseling sessions at Choices Family Services with Droppers. Dawn also stated that she was present during both of the sessions. During the sessions, Dawn testified she overheard Kirstin make a couple of brief statements to Droppers regarding the alleged sexual assault. According to Dawn, Kirstin said that "Pappy's butt touched my butt," during one session, and in the other **[\*\*\*159]** session Kirstin denied that anything happened. Dawn agreed that she told her grandmother, Helen, about what she overheard, but maintained that she did not intend to waive any privilege by



doing so.

**[\*P18]** The court took the matter under advisement. On October 22, 2002, the court, sua sponte, scheduled a hearing to determine whether a guardian ad litem should be appointed to represent Kirstin's interests. The State argued that one should be appointed because Kirstin's and Dawn's interests did not coincide, while Denis opposed the appointment. On **[\*\*368]** November 11, 2002, the court concluded that a guardian ad litem would not be appointed because it could not "say that [Dawn was] not acting in [Kirstin's] best interests."

**[\*P19]** On November 22, 2002, the State moved for an in camera interview with Kirstin's counselor from Choices Family Services, Droppers. The court did not decide the issue, and, on December 20, 2002, the State moved the court to "reconsider or consider with finality" the State's motion for a determination that Dawn waived Kirstin's counselor-patient privilege.

**[\*P20]** The court concluded that Dawn did waive Kirstin's privilege. Although the statements Dawn overheard and restated to Helen were relatively brief in time and did not relate to all of the purposes of Kirstin's counseling, the court determined that the statements were material and "germane to a significant part of the matter being discussed at the time, that is an alleged sexual assault." However, the court found the waiver was limited to "only those statements, impressions, opinions, et cetera which are attendant to the issues of purported sexual assault." Given the waiver, the court later determined that it would schedule an in camera hearing with Droppers to examine matters relating to the alleged sexual assault. The court issued an order accordingly.

**[\*P21]** Dawn moved to intervene, claiming that she was "the privilege[] holder under § 905.04, Wis. Stats. for the counseling records for her daughter, Kirstin R." Further, "as the privilege[] holder for Kirstin, [Dawn] has the right to refuse to disclose any privileged information contained in the counseling relationship between Kirstin R., [Dawn] (the movant), and/or Judy Droppers, the counselor, and/or Choices Family Education Services, Inc." Dawn then alleged that the court's

**[\*\*369]** conclusion that Dawn waived Kirstin's privilege "impaired [Dawn's] ability to protect her interests both in the Trial Court and in any appeal of that decision." Finally, Dawn stated that as the privilege holder for Kirstin, "[Dawn's] interests are inadequately represented by any of the existing parties of this action." The circuit court allowed her to intervene, and she appealed the court's order.

**[\*P22]** In a published decision, the court of appeals affirmed the circuit court's order. State v. Denis L.R., 2004 WI App 51, P1, 270 Wis. 2d 663, 678 N.W.2d 326. Dawn seeks review.

## II

**[\*P23]** Before setting forth the standard of review, we must first set forth what the arguments are in order to refine exactly what it is we are reviewing. The arguments in this case have fundamentally evolved since the case was handled by the court of appeals. At the court of appeals, Dawn agreed that the privilege belonged to Kirstin, but Dawn argued that as Kirstin's natural mother, she was Kirstin's guardian and therefore could claim Kirstin's privilege. See Wis. Stat. (Rule) § 905.04(3). \* **[\*\*\*160]**

## FOOTNOTES

<sup>8</sup> Wisconsin Stat. (Rule) § 905.04(3) states: <sup>HN2</sup> "The privilege may be claimed by the patient, by the patient's guardian or conservator, or by the personal representative of a deceased patient."

**[\*P24]** Dawn proceeded to argue that she did not waive Kirstin's privilege because the brief statement she overheard Kirstin tell the counselor amounted to 30-seconds worth of statements in 120 minutes of counseling and because Kirstin was at counseling to **[\*\*370]** discuss more than just the sexual assault. Under these circumstances, Dawn claimed, she did not disclose "any significant part of the matter or communication." See Wis. Stat. (Rule) § 905.11.

**[\*P25]** Dawn also argued she could not have waived the privilege because she did not intend to waive the privilege.

**[\*P26]** The State countered by arguing that the waiver inquiry should not focus on the statement's brevity when compared with the therapy session's overall time. Instead, the State maintained that the statement should be evaluated in light of the therapy sessions' purposes. Because Dawn's statements regarding what Kirstin said during counseling concerned one of the purposes for which Kirstin was in treatment, that being the sexual assault, the State contended that Dawn disclosed a "significant part of the matter or communication." See Wis. Stat. (Rule) § 905.11.

**[\*P27]** In response to Dawn's second argument, the State claimed that a person need not have a specific intent to waive an evidentiary privilege in order for the privilege to be waived. Instead, the State maintained that an evidentiary privilege is waived when the underlying statement is volitionally disclosed.

**[\*P28]** The court of appeals agreed with the State. See Denis L.R., 2004 WI App 51, P16, 19, 270 Wis. 2d 663, 678 N.W.2d 326 (2004).

**[\*P29]** Dawn has since switched tactics. She now argues that she was a member in group therapy. See Wis. Stat. (Rule) § 905.04(2).

**[\*P30]** Alternatively, Dawn contends that she could not have waived Kirstin's privilege because she is not Kirstin's "guardian" for purposes of claiming and waiving Kirstin's privilege under Wis. Stat. (Rule) § 905.04(3). **[\*\*371]** <sup>9</sup> Looking to other statutory sections, Dawn contends that a parent, though a "natural guardian," is not a guardian in this instance because to be a guardian requires a court appointment or qualification to act on behalf of the minor child. <sup>10</sup> Similarly, Dawn claims that she is **[\*\*\*161]** not her daughter's conservator, as that term also requires appointment or qualification by a court. <sup>11</sup>

## FOOTNOTES

<sup>9</sup> As noted earlier, in Dawn's motion to intervene in the circuit court, Dawn claimed

she was the privilege holder for Kirstin. With Dawn now arguing she is not Kirstin's privilege holder because she is not Kirstin's guardian for purposes of Wis. Stat. (Rule) § 905.04, Dawn does not explain how she has any interest in this litigation or standing to intervene.

**10** See, e.g., Wis. Stat. § 48.02(8) ("Guardian' means the person named by the court having the duty and authority of guardianship."); Wis. Stat. § 51.40(1)(f) ("Guardian' means a guardian of the person appointed by a court under ch. 880."); Wis. Stat. § 146.34(1)(d) ("Guardian' means the person named by the court under ch. 48 or 880 having the duty and authority of guardianship."); Wis. Stat. § 880.01(3) ("Guardian' means one appointed by a court to have care, custody and control of the person of a minor or an incompetent or the management of the estate of a minor, an incompetent or a spendthrift."); Wis. Stat. § 880.81(7) ("Guardian' means a person appointed or qualified by a court as a guardian of the person or estate, or both, of an individual, including a limited guardian, but not a person who is only a guardian ad litem."); Wis. Stat. § 938.02(8) ("Guardian' means the person named by the court having the duty and authority of guardianship.").

**11** See, e.g., Wis. Stat. § 880.61(3) ("Conservator' means a person appointed or qualified by a court to act as general, limited or temporary guardian of a minor's property or a person legally authorized to perform substantially the same functions."); § 880.81(3) ("Conservator'" means a person appointed or qualified by a court by voluntary proceedings to manage the estate of an individual, or a person legally authorized to perform substantially the same functions.").

**[\*\*372] [\*P31]** Alternatively, she renews her argument that she could not have waived Kirstin's privilege because she did not knowingly, intentionally, and voluntarily waive it. See Johnson v. Zerbst, 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938).

**[\*P32]** The State has responded to Dawn's shifting positions by doing the same. The State now argues that the issue of waiver is irrelevant. Because Kirstin's counselors had reasonable ground to believe that Kirstin was the victim of child

sexual assault, the State argues there is no privilege at all and thus no need to address any of the waiver issues. See Wis. Stat. (Rule) § 905.04(4)(e).

**[\*P33]** The State then makes a number of alternative arguments. First, the State maintains that the record does not support an implicit circuit court finding that Dawn was a participant in group therapy with Kirstin. Second, the State contends that in the courts below, Dawn has conceded that she is Kirstin's guardian for purposes of claiming the privilege and therefore this court should hold her to that position. Third, the State maintains that as Kirstin's natural guardian, Dawn can claim and waive the privilege. And finally, the State asserts that to waive a privilege requires only a volitional disclosure of confidential communications, as opposed to an intentional, voluntary, and knowing waiver of the privilege. <sup>12</sup>

#### FOOTNOTES

<sup>12</sup> In the trial court, the State sought production of confidential records under Wis. Stat. § 146.82(2)(a)11. The State now asserts that patient health care records do not include records that are subject to Wis. Stat. § 51.30, the Mental Health Act. The State further asserts that pursuant to Wis. Stat. § 51.30(6), §§ 905.03 and 905.04 supersede § 51.30 with respect to communications between physicians and patients. It has not been established in this record that Choices Family Services is a Chapter 51 provider or that § 51.30 is applicable here. Nor was this argument presented to the trial court. We therefore decline to treat this as a request under Chapter 51.

#### **[\*\*373]** III

**[\*P34]** Having set forth the arguments, the starting point is whether Kirstin has a privilege in the first instance given the exception to privilege for child abuse under Wis. Stat. (Rule) § 905.04(4)(e)2. The resolution of this issue requires an interpretation of § 905.04(4)(e)2.

**[\*P35]** <sup>HN3</sup> The interpretation of court rules present questions of law, which we review independently. See Harold Sampson Childrens Trust v. Linda Gale Sampson 1979 Trust, 2004 WI 57, P15, 271 Wis. 2d 610, 679 N.W.2d 794 (Wis. 2004). When we interpret court rules, we turn to the rules of statutory construction for guidance. State v. Sorenson, 2000 WI 43, P15, 234 Wis. 2d 648, 611 N.W.2d 240. We assume that the legislature's and this court's intent is expressed in the language of the statute and rule. *Id.* Therefore, we begin with the language of the statute or rule. State ex rel. Kalal v. Circuit Court for Dane County, 2004 WI 58, P45, 271 Wis. 2d 633, 681 N.W.2d 110. Generally, language is given its common, ordinary, and accepted meaning. *Id.* Further, we consider language "in the context in which it is used; not in isolation but as part of a whole; in relation **[\*\*\*162]** to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or

unreasonable results." *Id.*, P46. Unless this interpretive process yields an ambiguity, our inquiry ends. *Id.*

#### IV

**[\*P36]** <sup>HN4</sup> Wisconsin Stat. (Rule) § 905.04(2) provides the general rule of privilege. It states:

<sup>HNS</sup> **[\*\*374]** (2) GENERAL RULE OF PRIVILEGE. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, among the patient, the patient's physician, the patient's registered nurse, the patient's chiropractor, the patient's psychologist, the patient's social worker, the patient's marriage and family therapist, the patient's professional counselor or persons, including members of the patient's family, who are participating in the diagnosis or treatment under the direction of the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor.

**[\*P37]** <sup>HNG</sup> The therapist-patient privilege in Wis. Stat. (Rule) § 905.04(2) is a testimonial rule of evidence. Steinberg v. Jensen, 194 Wis. 2d 439, 464, 534 N.W.2d 361 (1995). The overriding purpose of the therapist-patient privilege is to prevent the unnecessary disclosure of "confidential" information. *Id.* at 459. The public policy underpinning this privilege is to encourage patients to freely and candidly discuss mental health concerns with their therapists by ensuring that those concerns will not be unnecessarily disclosed to third persons. See *id.*

**[\*P38]** However, this privilege is not absolute. Aside from the fact that statutory privileges are to be strictly and narrowly construed, Steinberg, 194 Wis. 2d at 464, there are a number of exceptions to the therapist-patient privilege set forth in Wis. Stat. (Rule) § 905.04(4). One of those exceptions, Wis. Stat. § 905.04(4)(e)2., concerns child abuse. Section 905.04(4)(e)2 reads:

<sup>HNT</sup> There is no privilege in situations where the examination of an abused or neglected child creates a reasonable ground for an opinion of the . . . family therapist or **[\*\*375]** professional counselor that the abuse or neglect was other than accidentally caused or inflicted by another.

**[\*P39]** In Rusecki v. State, 56 Wis. 2d 299, 317-318, 201 N.W.2d 832 (1972), this court observed that <sup>HNB</sup> "while there are no Wisconsin cases interpreting [what is now § 905.04(4)(e)2.] as applying to other than child abuse juvenile litigations, a plain reading would appear to include any case where a child is injured other than accidentally." <sup>13</sup> We agree. Our review of the statute's language indicates that the child abuse exception applies when three criteria are satisfied.

#### FOOTNOTES

<sup>13</sup> At the time of Rusecki v. State, 56 Wis. 2d 299, 201 N.W.2d 832 (1972), the

prior version of Wis. Stat. (Rule) § 905.04(4)(e), Wis. Stat., Wis. Stat. § 885.21(1)(f) (1971), provided:

(1) No physician or surgeon shall be permitted to disclose any information he may have acquired in attending any patient in a professional character, necessary to enable him professionally to serve such patient, except only:

....

(f) In situations where the examination of an abused or injured child creates a reasonable ground for an opinion of the physician or surgeon that the condition was other than accidentally caused or inflicted by another.

**[\*P40]** <sup>HN9</sup> **[\*\*\*163]** The first criterion requires an "examination" of the child to have occurred. There is no requirement that any particular person conduct the examination, as Wis. Stat. (Rule) § 905.04(4)(e)2 requires only that an examination occurred. The word examination is not defined in the statute, so we turn to ordinary dictionary definitions to determine the word's common and ordinary meaning. See Garcia v. Mazda Motor of Am., Inc., 2004 WI 93, P14, 273 Wis. 2d 612, 682 N.W.2d 365. An examination is "the act or process of examining or state of being examined." Webster's Third New Int'l **[\*\*376]** Dictionary 790 (unabr. 1986). To "examine," in turn, means "to test by an appropriate method . . . to look over: inspect visually or by use of other senses. . . . To inspect or test for evidence of disease or abnormality. . . . To inquire into the state of esp. by introspective processes." Id. Thus, the term "examination" refers to and can encompass a wide variety of exploratory practices. <sup>14</sup> See also, 7 Daniel D. Blinka, Wisconsin Practice: Wisconsin Evidence § 504.4, at 292 (2d ed. 2001) (referring to the "examination" as simply an "initial determination").

#### FOOTNOTES

<sup>14</sup> In a brief footnote, and without explanation, the court of appeals has stated that the requisite examination is a "physical examination" of a possibly abused or neglected child. See State ex rel. Klieger v. Alby, 125 Wis. 2d 468, 473 n.7, 373 N.W.2d 57 (Ct. App. 1985). Klieger was overruled by Steinberg v. Jensen, 194 Wis. 2d 439, 534 N.W.2d 361 (1995), on different grounds, and, to the extent Klieger has any remaining precedential value, we withdraw the limitation on the exception requiring a physical exam. We see nothing in the exception that limits

its purview to opinions formed from physical examinations. In fact, most of the enumerated providers in the exception are mental health providers. See 7 Daniel D. Blinka, *Wisconsin Practice: Wisconsin Evidence* § 504.4, at 292 (2d ed. 2001) ("Most often these cases will involve some form of physical abuse, but emotional abuse is also within its aegis.").

**[\*P41]** The second criterion requires that the examination create "a reasonable ground for an opinion" of the enumerated providers that the child has been abused or neglected.

**[\*P42]** The third criterion requires that the opinion must relate to abuse or neglect that was caused by means other than accident or infliction by another. "Abuse" is broadly defined in Wis. Stat. § 48.02(1), but for purposes of this case it suffices to note that the definition includes sexual contact. See Wis. Stat. § 48.02(1)(b); Wis. Stat. (Rule) § 905.04(4)(e)1.a.

**[\*\*377] [\*P43]** When these criteria are satisfied, Wis. Stat. (Rule) § 905.04(4)(e)2 states that "there is no privilege." As noted, the "privilege" applies to "confidential communications made or information obtained or disseminated for purposes of . . . treatment of the patient's . . . mental or emotional condition . . . ." Wis. Stat. (Rule) § 905.04(2). We agree with the State that these criteria are satisfied here.

A

**[\*P44]** First, there was an examination of Kirstin. Dawn brought Kirstin and a sibling to Choices Family Services where they had two one-hour counseling sessions. Dawn indicated she brought her children to Choices after learning of the possibility that Kirstin was sexually assaulted.<sup>15</sup>

#### FOOTNOTES

<sup>15</sup> Dawn stated she also brought Kirstin and her sibling to Choices to address other family issues.

**[\*P45]** At a motion hearing, Dawn testified the purpose of the counseling sessions was to "rationalize and reason out what was going on." The record contains little information about the counseling sessions, other than that the counselors utilized a form of "play therapy" during which time **[\*\*\*164]** Kirstin stated, and recanted, that Denis put his "butt" in her "butt." Nevertheless, we conclude the record establishes that an examination of Kirstin occurred.

B

**[\*P46]** The second and third criteria are also satisfied because there was a

reasonable ground for an opinion of one of the enumerated providers in Wis. Stat. (Rule) § 905.04(4)(e)2. **[\*\*378]** that Kirstin had been abused or neglected and that the abuse or neglect was by means other than accident or infliction by another.

**[\*P47]** This conclusion flows from the consideration of what Kirstin stated to Droppers at Choices Family Services during the counseling sessions followed by what Fears did in reaction to those statements. As already noted, during the counseling sessions, Kirstin stated that Denis put his "butt" in her "butt." After the counseling sessions, Fears, the clinical director of Choices Family Services contacted the police to report Denis for sexually assaulting Kirstin, presumably pursuant to his mandatory reporting obligation.

**[\*P48]** <sup>HN10</sup> According to Wis. Stat. § 48.981(2), counselors are legally required to report to the authorities if the counselor has "reasonable cause to suspect" that the child "has been abused or neglected." <sup>16</sup> Wisconsin Stat. § 48.981(3)(a) further requires the counselor to inform **[\*\*379]** the authorities of "the facts and circumstances contributing to a suspicion of child abuse or neglect . . . ." *Id.* Reports and records of suspected child abuse, even though confidential, may be reported to law enforcement officers and agencies, as well as a district attorney, for purposes of investigation or prosecution. Wis. Stat. § 48.981(7)(a)8.

#### FOOTNOTES

**16** Wisconsin Stat. § 48.981(2)(a) provides:

<sup>HN11</sup> Any of the following persons who has reasonable cause to suspect that a child seen by the person in the course of professional duties has been abused or neglected or who has reason to believe that a child seen by the person in the course of professional duties has been threatened with abuse or neglect and that abuse or neglect of the child will occur shall, except as provided under sub. (2m), report as provided in sub. (3):

...

9. A medical or mental health professional not otherwise specified in this paragraph.

...

11. A marriage and family therapist

12. A professional counselor.



**[\*P49]** The meaning of these mandatory reporting statutes was explained in State v. Hurd, 135 Wis. 2d 266, 272-73, 400 N.W.2d 42 (Ct. App. 1986). In Hurd, an administrator of a boys' youth ranch, was charged with violating the reporting statute's mandatory reporting requirements after learning that one of the adults residing at the ranch made advances toward some, and sexually assaulted at least one, of the boys. Id. at 270. He argued that the above-mentioned mandatory reporting standards were unconstitutionally vague. Id. at 271. The court of appeals disagreed. Id.

**[\*P50]** The court initially determined that "the reasonable cause to suspect" that the child "has been abused or neglected" standard required an examination of "the totality of the facts and circumstances actually known to, and as viewed from the standpoint of, [the defendant]." Id. at 272-73. According to the court of appeals, <sup>HN12</sup> the test is "whether a prudent person would have had reasonable cause to suspect child abuse if presented with the same totality of circumstances as that acquired and viewed by the defendant." Id. at 273. <sup>17</sup>

#### FOOTNOTES

<sup>17</sup> Although the test utilized a standard of reasonableness, the court noted similar standards were employed in other substantive crimes and areas of criminal law.

State v. Hurd, 135 Wis. 2d 266, 273, 400 N.W.2d 42 (Ct. App. 1986).

**[\*P51]** The court then focused attention on the meaning of the term "suspicion" in Wis. Stat. § 48.981(3)'s requirement that **[\*\*\*165]** the person inform the **[\*\*380]** authorities of "the facts and circumstances contributing to a suspicion of child abuse." Id. at 272. Turning to the ordinary dictionary definition of the word, the court of appeals observed that "suspicion" means a "belief or opinion based upon facts or circumstances which do not amount to proof." Id. at 274 (citation and quotation omitted).

**[\*P52]** Viewing these standards together, the court of appeals concluded the "reasonable cause to suspect" standard ultimately "involves a belief, based on evidence but short of proof, that an ordinary person would reach as to the existence of child abuse." Id.

**[\*P53]** The court of appeals in Hurd recognized that a counselor's reporting requirement centers on a reasonable belief or opinion based on the totality of circumstances that the child has been abused. We conclude that this test is analogous to Wis. Stat. (Rule) § 905.04(4)(e)2.'s "reasonable ground for an opinion" standard. <sup>18</sup> Where a counselor reports child abuse under Wis. Stat. § 48.981(2) and (3), that counselor has expressed a "reasonable ground for an opinion . . . that the abuse or neglect was other than accidentally caused or inflicted by another." See Wis. Stat. (Rule) § 905.04(4)(e)2. <sup>19</sup>

## FOOTNOTES

**18** That is to say, the counselor's opinion is not necessarily the equivalent of an expert's testimonial opinion that answers an ultimate issue of fact, which ordinarily must be stated to a reasonable degree of certainty.

**19** This syllogism will not always hold true. <sup>HN13</sup> Those required to report under Wis. Stat. § 48.981 include many persons not mentioned in Wis. Stat. (Rule) § 905.04(4)(e)2. Thus, for example, if a teacher has a reasonable suspicion that a child is abused, and that child has been seeing a counselor, the teacher's reporting does not abrogate the child's counselor-patient relationship.

**[\*\*381] [\*P54]** Here, Fears formed a reasonable suspicion that child abuse occurred, as he informed the police "that he became aware of the fact that a 3-year old girl had made admission that her grandfather had sexually assaulted her on several occasions." Thus, according to the reporting obligations under Wis. Stat. § 48.981 and in light of Hurd, it necessarily means that he had reasonable grounds to form an opinion that Kirstin had been abused. Further, from the totality of circumstances surrounding the nature of the allegations, there is no doubt that Fears' opinion was premised on his suspicion that the abuse was other than accidentally caused.

**[\*P55]** Accordingly, because the strictures of Wis. Stat. (Rule) § 905.04(4)(e)2 have been met, there is no privilege with regard to any confidential communications Kirstin made at Choices Family Services regarding the sexual assault for purposes of treatment. <sup>20</sup> See <sup>HN14</sup> Wis. Stat. (Rule) § 905.04(2) ("privilege" refers to "confidential communications made or information obtained or disseminated for purposes of . . . treatment of the patient's . . . mental or emotional condition . . .").

## FOOTNOTES

**20** We limit the breadth of the exception's application because Kirstin went to counseling for many reasons. The exception applies to the extent that any communications made for mental health treatment regarding the sexual abuse are not privileged. Kirstin's other communications that related to other reasons for attending counseling remain privileged, unless they relate to the opinion that Kirstin was abused or neglected.

**[\*P56]** The State seeks an in camera review of Droppers. However, the record is silent as to whether Droppers has any information that is relevant to the sexual assault. A reasonable inference could be drawn to support this position, but there is no indication of this in the record. Further, **[\*\*\*166]** in connection with the trial **[\*\*382]** court's review of Kirstin's records that were turned over because of Fears' opinion, we do not know which records were examined or what is contained in those records. All that we do know is that Dawn overheard Kirstin tell Droppers that Denis did and did not sexually assault her. Assuming this information is not contained in Kirstin's counseling records, Droppers may have information that has not been reduced to writing that is relevant to either the State or to Denis in the prosecution of this case.

**[\*P57]** If Droppers has such information, then, consistent with our conclusion above, that information is not privileged. As that information is not privileged, there is no need for an in camera review. The parties may ask Droppers about any communications Kirstin made during therapy for mental health treatment regarding the sexual abuse. <sup>21</sup>

#### FOOTNOTES

<sup>21</sup> This conclusion does not do violence to Kirstin's substantive right to confidentiality to her patient health records under Wis. Stat. § 146.82(1). See State v. Allen, 200 Wis. 2d 301, 311, 546 N.W.2d 517 (Ct. App. 1996).

In Allen, the court of appeals held that <sup>HN15</sup> information covered by the evidentiary privilege statute, Wis. Stat. (Rule) § 905.04, and confidentiality of records statute, § 146.82, will overlap in many instances "because a patient's health care record under § 146.82 may often include a record of a confidential communication between the patient and a health care provider under § 905.04." Id. at 309. The court of appeals concluded that "although §§ 146.82 and 905.04 are recited in different chapters of the statutes, they both address the confidential or privileged status of health care information and communications." Id. Accordingly, they must be read together in pari materia to avoid any conflicts, as "they represent a collective statement as to the reach and limits of the confidentiality and privilege which attach to such records or communications." Id. at 309-10.

This case does not directly involve patient health care records, though, as the trial

court has already examined them in camera for material information. Still, if there is a communication documented in Kirstin's health care records that was missed, requiring Droppers to testify as to that communication does not violate Kirstin's right to confidentiality because there is also an exception to patient confidentiality for child abuse. <sup>HN16</sup> Wisconsin Stat. § 146.82(2)(a)11. provides that a patient's health care records "shall be released . . . to a . . . district attorney for purposes of investigation of threatened or suspected child abuse or neglect . . . or for purposes of prosecution of alleged child abuse or neglect, if the person conducting the investigation or prosecution identifies the subject of the record by name." Those records can then be disclosed for purposes of investigation or prosecution. See *id.* citing Wis. Stat. § 48.981(7)(a)8.

**[\*\*383]** V

**[\*P58]** In sum, we conclude that there is no privilege here because an examination of Kirstin created a reasonable ground for an opinion that she was abused and that her abuse was other than accidentally caused or inflicted by another. Because there is no privilege with respect to any communications Kirstin made for purposes of mental health treatment related to the sexual abuse, there is no need for an in camera review of Droppers. The parties may ask Droppers questions regarding any communications Kirstin made for purposes of treatment that is relevant to the prosecution or defense of Denis for the sexual assault. Accordingly, we affirm the decision of the court of appeals, and remand this matter to the trial court for further proceedings consistent with this opinion.

*By the Court.* -Affirmed and cause remanded for further proceedings consistent with this opinion.